

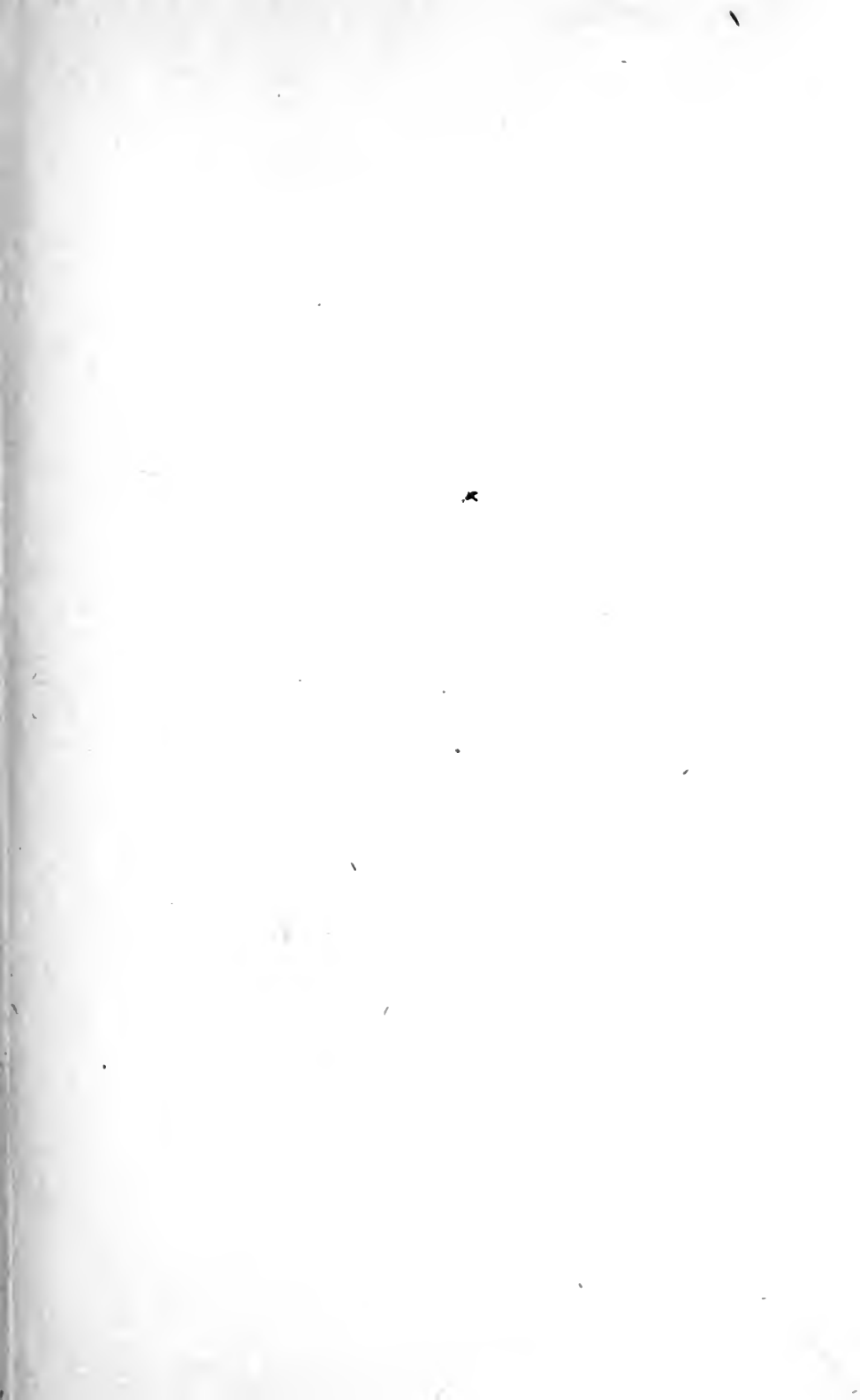
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Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



No. 11384

United States ^{N 2449}

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH LANE, HENRY E. REED and STANLEY SMITH,
partners doing business under the firm name and style of
REED and LANE, Plumbers, Heaters and Sheet Metal,
Appellants,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON,
joint owners and partners doing business as THE RANCH,
and the FIRST NATIONAL BANK OF FAIRBANKS,
ALASKA,

Appellees.

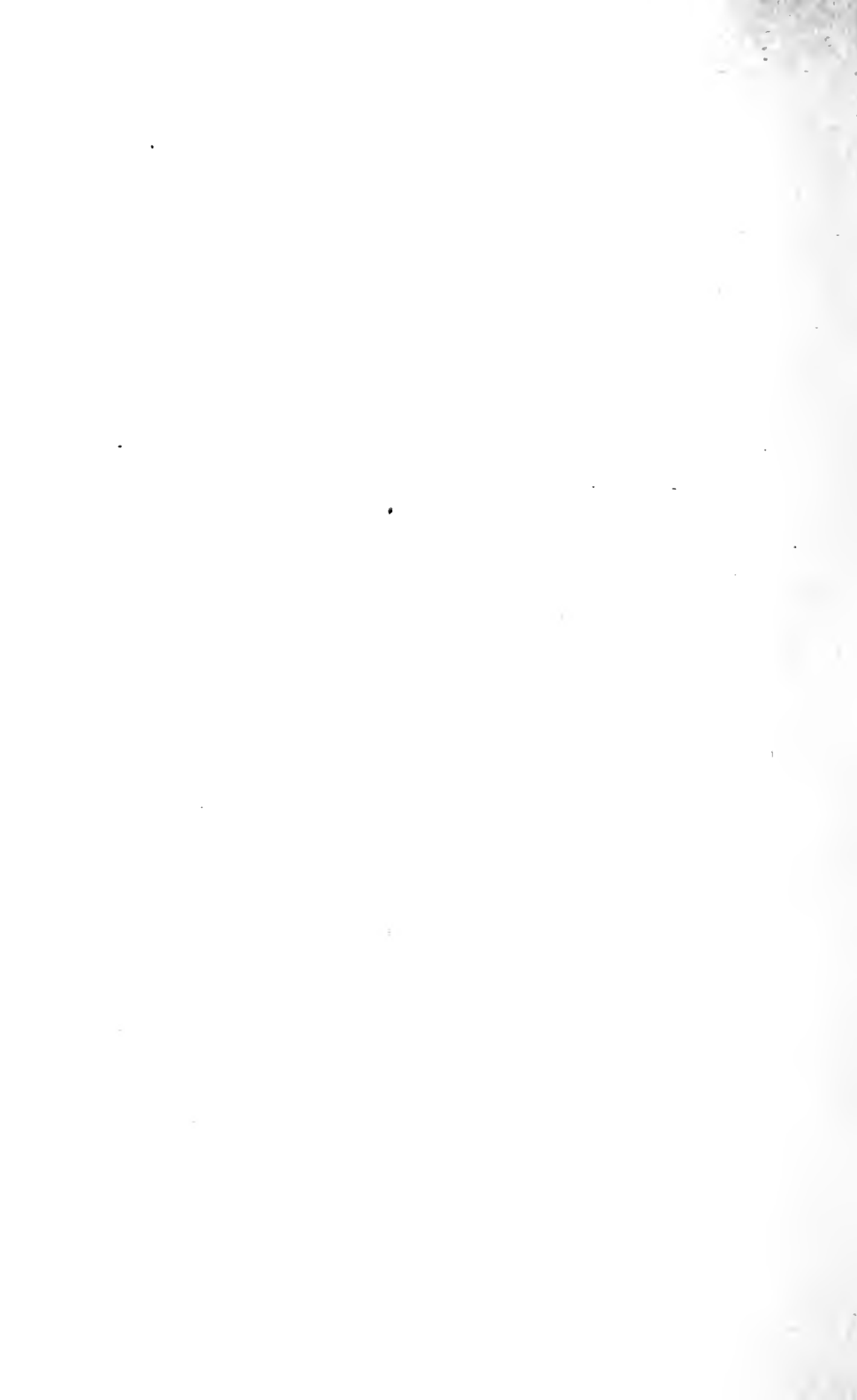
Transcript of Record

Upon Appeal from the District Court for the Territory of
Alaska, Fourth Division

FILED

OCT 1 - 1946

PAUL P. O'BRIEN,
CLERK



No. 11384

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH LANE, HENRY E. REED and STANLEY SMITH,
partners doing business under the firm name and style of
REED and LANE, Plumbers, Heaters and Sheet Metal,
Appellants,

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ALASKA,

Appellees.

Transcript of Record

Upon Appeal from the District Court for the Territory of
Alaska, Fourth Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Motion for a New Trial	35, 188
Amended Complaint	12
Answer	21
Attorneys of Record	1
Appeal:	
Bond on	79
Certificate of Clerk to Transcript of Record on	200
Notice of	43, 193
Assignment of Errors	46
Bill of Exceptions	86
Bond on Appeal	79
Certificate of Clerk to Transcript of Record on Appeal	200
Complaint	2
Findings of Fact and Conclusions of Law.....	67
Judgment	40, 73
Motion for a New Trial	31
Notice of Appeal	43, 193

Order Allowing Appeal and Fixing Amount of Bond	77
Order Denying Motion for a New Trial.....	40
Order Extending Time to File Record and Docket Cause	199
Order that Exhibits Need not be Printed	202
Petition for Allowance of Appeal.....	44
Praeceptum for Transcript of Record.....	84
Reply	25
Stipulation Extending Time	199

ATTORNEYS OF RECORD

BAILEY E. BELL,

WARREN A. TAYLOR,

Fairbanks, Alaska,

Attorneys for Plaintiffs and Appellants.

CECIL H. CLEGG,

Fairbanks, Alaska,

Attorney for Defendants and Appellees.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5288

JOSEPH LANE, HENRY E. REED and STAN-
LEY SMITH, partners doing business under
the firm name and style of REED and LANE,
plumbers, heaters and sheet metal,
Plaintiffs,

vs.

GEORGE GILBERTSON and HARVEY GIL-
BERTSON, joint owners and partners doing
business as THE RANCH and the FIRST
NATIONAL BANK OF FAIRBANKS,
ALASKA,
Defendants.

COMPLAINT

Comes now the above named plaintiffs and for
their cause of action against the above named de-
fendants and each of them, allege and state:

1.

That the plaintiffs above named are now and
have been at all times herein mentioned co-partners
doing business under the firm name and style of
Reed and Lane, plumbers, heaters and sheet metal,
with an office and business in the Town of Fair-
banks, Alaska.

2.

That the defendants, George Gilbertson and Har-
vey Gilbertson are the joint owners and partners

doing business as 'The Ranch near the Town of Fairbanks, Alaska.

3.

That the First National Bank of Fairbanks, Alaska, is a corporation organized under the National Banking Laws of the United States, with its principal place of business at Fairbanks, Alaska.

4.

Plaintiffs further allege that on or about the 7th day of November, 1944, the defendants, George Gilbertson and Harvey Gilbertson, joint owners [1*] and partners doing business as 'The Ranch, employed these plaintiffs to do certain plumbing, steam fitting and sheet metal work and to furnish certain materials to be used in the buildings and improvements situated upon the hereinafter described premises and property which improvements were then being constructed, remodeled and repaired and at the special instance and request of the two last named defendants, the plaintiffs did and furnished certain work and labor and certain material in the installation and finishing of the improvements and building on said property and that continuously from the commencement of said work and week by week and month by month, these plaintiffs expended and furnished labor, skill and material which were incorporated in the buildings, improvements and structures on the above described real estate; that all of said labor, skill and materials were incorporated in said structures.

* Page numbering appearing at foot of page of original Reporter's Transcript.

5.

That these plaintiffs supplied the last item of work and material on the 23rd day of December, 1944; that they supplied work and material as aforesaid of the value of \$2,107.24 on which the defendants are entitled to a credit for a return of materials and cash paid on account to the extent of \$677.48 leaving a balance due these plaintiffs in the sum of \$1,429.76 together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944.

6.

Plaintiffs further allege that all of said labor and materials were furnished and used in the betterment and finishing of the buildings and improvements located on the following described property, to-wit:

That piece or parcel of land described by metes and bounds as follows, to-wit: commencing at the northeast corner of the Homestead of August W. Bjerremark (Patent No. 929387) said corner being situate on the boundary line between sections Fourteen (14) and Fifteen (15), Township One (1), South, Range One (1) West of Fairbanks Meridian:

Then South $0^{\circ} 64'$ W 434.22 feet to corner Number Two (2); thence South $89^{\circ} 56'$ West 397.93 feet to corner Number Three (3); thence North $10^{\circ} 52'$ West 442.66 feet to corner Number Four (4); thence North $89^{\circ} 56'$ East 476.05 feet to corner Number One (1) the place of beginning. [2]

7.

Plaintiffs further allege that the work and labor was all done and materials all furnished and the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, accepted said job as finished and promised to pay therefor, but have failed, neglected and now refuse to pay.

8.

That the owners of the above described property are George Gilbertson and Harvey Gilbertson, two of the defendants above named.

9.

That at all times plaintiffs have claimed the benefit of the laws of Alaska relative to liens for labor performed and materials furnished on real estate and did on or about the 21st day of March, 1945, claim a lien upon said property by recording in the office of the Recording District wherein said property is situate and said work performed and materials furnished to-wit: The Fairbanks Recording District, a duly verified notice of contractors lien containing a true and correct account of said demand of plaintiffs, after deducting all just credits and offsets, describing said premises sufficiently for identification naming the owners thereof and claiming a contractors lien thereon, a copy of which said claim of lien is attached hereto, marked "Exhibit A" and by this reference made a part hereof.

10.

That no part of the money claimed in said lien as set out in plaintiffs "Exhibit A" has been paid, but the entire amount of \$1,429.76 together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, is still due and owing.

11.

That the plaintiffs were compelled to and did pay the sum of \$15.00 for legal services for preparing said lien and as the cost recording the same and that by reason of this suit, plaintiffs claim a reasonable attorneys fee for their attorney, for the foreclosure of the lien above set forth and that a reasonable attorneys fee is ten per cent (10%) of the amount involved herein or the sum of \$142.97. [3]

12.

Plaintiffs further allege that they performed each and every material act necessary to fully and completely finish their contract and obligations on their part and there is nothing more to do except for the defendants to pay the plaintiffs the amount due thereon.

13.

Plaintiffs further allege that the First National Bank of Fairbanks, Alaska, claims some right, title lien or interest in and to the above described property, but that any lien it has is junior and inferior to the lien of these plaintiffs and that said Bank should be required to come into Court and set up such claim as it may have against this property or any part thereof.

Wherefore, plaintiffs pray judgment against the defendants and each of them as follows, to-wit:

(A) Against the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch for the sum of \$1,429.76, together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, and for a further judgment in the sum of \$15.00, the cost and expense in filing the lien above described and for an attorney's fee for plaintiffs attorney in the sum of \$142.97 and for further judgment for the costs of this action.

(B) Judgment foreclosing plaintiffs lien against said real property together with all building and improvements thereon and ordering the sale thereof to satisfy said principal amount of \$1,429.76 together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, and for the further sum of \$15.00, the expense of filing the lien and for an attorney's fee for plaintiffs attorney in the sum of \$142.97 and for the further judgment ordering that if the proceeds of such sale do not satisfy plaintiffs' claim in full, that a deficiency judgment be entered for the balance.

(C) For the further judgment decreeing said property and the whole title thereof subject to the plaintiffs' lien above prayed for and cutting off forever the interest of the defendants in and to said property herein above described and decreeing that the lien or interest, if any, of the First National

Bank of Fairbanks, Alaska, to be junior and inferior to the lien of these plaintiffs. [4]

(D) For such other and further relief as the Court shall deem just and proper in the premises.

BAILEY E. BELL,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Henry E. Reed, being first duly sworn, on oath, deposes and says: That he is one of the partners of the above firm which are the plaintiffs above named; that he has read the above complaint and knows the contents thereof and that the allegations therein are true, as he verily believes.

HENRY E. REED.

Subscribed and sworn to before me this 30th day of March, 1945.

[Seal] BAILEY E. BELL,
Notary Public in and for Alaska. My commission expires 1/28/49. [5]

EXHIBIT "A"

NOTICE OF CONTRACTORS LIEN

United States of America, Territory of Alaska,
Fourth Division, Fairbanks Precinct

[Title of Cause.]

Notice is hereby given that Joseph Lane, Henry E. Reed and Stanley Smith, doing business as Reed and Lane, plumbers, heaters and sheet metal, claim a lien on the hereinafter described real estate and improvements thereon against George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch who are the owners of record of the property hereinafter described property.

That piece or parcel of land described by metes and bounds as follows, to-wit: commencing at the northeast corner of the Homestead of August W. Bjerremark (Patent No. 929387) said corner being situate on the boundary line between sections Fourteen (14) and Fifteen (15), Township One (1) South, Range One (1) West of Fairbanks Meridian;

Thence south $0^{\circ} 04' W$ 434.22 feet to corner Number Two (2); thence South $89^{\circ} 56' W$ 397.93 feet to corner Number Three (3); thence North $10^{\circ} 52' W$ 442.66 to corner Number Four (4); thence North $89^{\circ} 56' E$ 476.05 feet to corner Number One (1) the place of beginning.

This claim of lien is based upon the following facts; the defendants herein employed these claim-

ants to do certain plumbing, steam fitting and sheet metal work and to furnish certain materials in plumbing, heating and sheet metal finishing of the building and improvements situated upon the above described premises and property which improvements were then being built, constructed and remodeled and at the special instance and request of the above named defendants, the claimants did and furnishd certain work and labor and certain material in the installation and finishing of the improvements on said [6] property and that continuously from the commencement of said work and week by week and month by month, the claimants expended and furnished labor, skill and material upon, and which were incorporated in the building, improvement and structures on the above described real estate; that all of said labor, skill and materials were incorporated in said structures; that claimants supplied the last item of work and materials on the 23rd day of December, 1944; that claimants supplied work and materials as aforesaid of the value of \$2,107.24 and that there has been credits on said indebtedness which includes a return of material and cash paid on account to the extent of \$677.48, leaving a balance due of \$1,429.76, together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944.

After deducting all just credits and offsets, the above named claimants now claim a lien against the defendants and on the property above described for the sum of \$1,429.76 together with interest there-

on at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, until paid.

That the name of the owner or reputed owner of said property is George Gilbertson and Harvey Gilbertson, which has been the situation at all times above mentioned; that ninety (90) days have not elapsed since claimants last rendition of service and delivery of materials to the defendants as aforesaid.

Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed & Lane, plumbers, heaters and sheet metal.

By HENRY E. REED,
One of the Partners.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Henry E. Reed, being first duly sworn, on oath, deposes and says: That he is one of the partners of the above firm which are the claimants above named; that he has read the above notice of claim of lien; knows the contents thereof and that the same is true, as he verily believes.

HENRY E. REED.

Subscribed and sworn to before me this 21st day of March, 1945.

BAILEY E. BELL,
Notary Public in and for Alaska. My commission expires 1/28/1949.

[Endorsed]: Filed March 31, 1945. [7]

[Title of District Court and Cause.]

DEMURRER

Come now George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, defendants above named, and demur to the Complaint on file herein upon the ground and for the reason that the same fails to state facts sufficient to constitute a cause of action against them, or either of them.

CECIL H. CLEGG,

Attorney for Defendants George Gilbertson and Harvey Gilbertson.

(Acknowledgment of Service.)

[Endorsed]: Filed May 1, 1945. [8]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Come now the above named plaintiffs and for their cause of action against the above named defendants and each of them, allege and state:

1.

That the plaintiffs above named are now and have been at all times herein mentioned co-partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, with an office and business in the Town of Fairbanks, Alaska.

2.

That the defendants, George Gilbertson and Harvey Gilbertson are the joint owners and partners doing business as The Ranch near the Town of Fairbanks, Alaska.

3.

That the First National Bank of Fairbanks, Alaska, is a corporation organized under the National Banking Laws of the United States, with its principal place of business at Fairbanks, Alaska.

4.

Plaintiffs further allege that on or about the 7th day of November, 1944, the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, employed these plaintiffs to do certain plumbing, steam fitting and sheet metal work and to furnish certain [9] materials to be used in the buildings and improvements situated upon the hereinafter described premises and property which improvements were then being constructed, remodeled and repaired and the defendants Gorge Gilbertson and Harvey Gilbertson orally agreed to pay therefor, the customary and reasonable price for the material furnished and the labor furnished and performed. At the special instance and request of the two last named defendants, the plaintiffs did and furnished certain work and labor and certain material in the installation and finishing of the improvements and building on said property and that continuously from the commencement of said work and week by

week and month by month, these plaintiffs expended and furnished labor, skill and material which were incorporated in the buildings, improvements and structures on the above described real estate; that all of said labor, skill and materials were incorporated in said structures.

5.

That these plaintiffs supplied the last item of work and material on the 23rd day of December, 1944; that they supplied work and material as aforesaid of the reasonable and customary value of \$2,107.24, on which the defendants are entitled to a credit for a return of materials and cash paid on account to the extent of \$677.46, leaving a balance due these plaintiffs in the sum of \$1,429.76, together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944.

6.

Plaintiffs further allege that all of said labor and materials were furnished and used in the betterment and finishing of the buildings and improvements located on the following described property, to-wit:

That piece or parcel of land described by metes and bounds as follows, to-wit: commencing at the northeast corner of the Homestead of August W. Bjerremark (Patent No. 929387) said corner being situate on the boundary line between sections Fourteen (14) and Fifteen (15), Township One (1)

South, Range One (1) West of Fairbanks, Meridian;

Thence South $0^{\circ} 64'$ W 434.22 feet to corner Number Two (2); thence South $89^{\circ} 56'$ West 397.93 feet to corner Number Three (3); thence North $10^{\circ} 52'$ West 442.66 to corner Number Four (4); thence North $89^{\circ} 56'$ East 476.05 feet to corner Number One (1) the place of beginning. All of said property being situated on the Richardson Highway near the town of Fairbanks, Alaska, in the Fourth Judicial Division. [10]

7.

Plaintiffs further allege that the work and labor was all done and materials all furnished in compliance with said oral contract, and the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, accepted said job as finished and promised to pay therefor, the sum herein sued for, but have failed, neglected and now refuse to pay.

8.

That the owners of the above described property are George Gilbertson and Harvey Gilbertson, two of the defendants above named.

9.

That at all times plaintiffs have claimed the benefit of the laws of Alaska relative to liens for labor performed and materials furnished on real estate and did on or about the 21st day of March, 1945, claim a lien upon said property by recording in

the office of the Recording District wherein said property is situate and said work performed and materials furnished, to-wit: The Fairbanks Recording District, in the Territory of Alaska, a duly verified notice of contractor's lien, containing a true and correct account of said demand of plaintiffs, after deducting all just credits and offsets, describing said premises sufficiently for identification naming the owners thereof and claiming a contractors lien thereon, a copy of which said claim of lien is attached hereto, (marked "Exhibit A") and by this reference made a part hereof.

10.

That no part of the money claimed in said lien as set out in plaintiffs' "Exhibit A" has been paid but the entire amount of \$1,429.76 together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, is still due and owing.

11.

That the plaintiffs were compelled to and did pay the sum of \$15.00 for legal services for preparing said lien and as the cost of recording the same and that by reason of this suit, plaintiffs claim a reasonable attorneys fee for their attorney, for the foreclosure of the lien above set forth and that a reasonable attorneys fee is ten per cent (10%) of the amount involved herein or the sum of \$142.97. [11]

12.

Plaintiffs further allege that they performed

each and every material act necessary to fully and completely finish their contract and obligations on their part and there is nothing more to do except for the defendants to pay the plaintiffs the amount due thereon.

13.

Plaintiffs further allege that the First National Bank of Fairbanks, Alaska, claim some right, title lien or interest in and to the above described property, but that any lien it has is junior and inferior to the lien of these plaintiffs and that said Bank should be required to come into Court and set up such claim as it may have against this property or any part thereof.

Wherefore, plaintiffs pray judgment against the defendants and each of them as follows, to-wit:

A. Against the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch for the sum of \$1,429.76, together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, and for a further judgment in the sum of \$15.00, the cost and expense in filing the lien above described and for an attorney's fee for plaintiffs attorney in the sum of \$142.97, and for further judgment for the costs of this action.

B. Judgment foreclosing plaintiffs' lien against said real property together with all building and improvements thereon and ordering the sale thereof to satisfy said principal amount of \$1,429.76 together with interest thereon at the rate of six per

cent (6%) per annum from the 23rd day of December, 1944, and for the further sum of \$15.00, the expense of filing the lien and for an attorney's fee for plaintiffs' attorney in the sum of \$142.97 and for the further judgment ordering that if the proceeds of such sale do not satisfy plaintiffs' claim in full, that deficiency judgment be entered for the balance.

C. For the further judgment decreeing said property and the whole title thereof subject to the plaintiffs lien above prayed for and cutting off [12] forever the interest of the defendant in and to said property herein above described and decreeing that the lien or interest, if any, of the First National Bank of Fairbanks, Alaska, to be junior and inferior to the lien of these plaintiffs.

D. For such other and further relief as the Court shall deem just and proper in the premises.

BAILEY E. BELL,

Attorney for Plaintiffs.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Henry E. Reed, being first duly sworn, on oath, deposes and says: That he is one of the partners of the above firm which are the plaintiffs above named; that he has read the above complaint and knows the contents thereof and that the allegations therein are true, as he verily believes.

HENRY E. REED.

Subscribed and sworn to before me this 9th day of May, 1945.

[Seal] BAILEY E. BELL,
Notary Public in and for Alaska. My commission expires 1/28/49.

(Acknowledgment of Service.)

(Here follows Exhibit "A", which is similar to Exhibit "A" attached to Complaint, and set out in full at page 9.)

[Endorsed]: Filed May 9, 1945. [13]

[Title of District Court and Cause.]

DEMURRER

Come now George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, defendants above named, and demur to the Amended Complaint of plaintiffs on file here-

in upon the ground and for the reason that it appears from the face of said Amended Complaint that the same fails to state facts sufficient to constitute a cause of action against said defendants or either of them.

CECIL H. CLEGG,

Attorney for Defendants George Gilbertson and
Harvey Gilbertson.

(Acknowledgment of Service.)

[Endorsed]: Filed May 14, 1945. [16]

[Title of District Court and Cause.]

DEMURRER

Come now George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, defendants above named, and demur to the Amended Complaint herein as further amended by interlineation with leave of said Court granted on May 18, 1945, upon the ground and for the reason that it appears from the face of said Amended Complaint as further amended by interlineation that the same fails to state facts sufficient to constitute a cause of action against these defendants.

CECIL H. CLEGG,

Attorney for Defendants George Gilbertson and
Harvey Gilbertson.

(Acknowledgment of Service.)

[Endorsed]: Filed May 23, 1945. [17]

[Title of Cause.]

ORDER

The plaintiffs were represented by Bailey E. Bell; the defendants by Cecil H. Clegg.

Respective counsel had argument on the defendants' Demurrer to the Amended Complaint.

It was Ordered that the Demurrer be sustained and that the plaintiff be permitted to amend by interlineation as follows, viz: "All of said property being situated on the Richardson Highway near the Town of Fairbanks, Alaska, in the Fourth Judicial Division." to be written at the bottom of Page 2 of the Amended Complaint; in the sixth line of Paragraph 9 after the word "District" the words "in the Territory of Alaska", said interlineations and additions to be done by the Clerk forthwith; that the defendants have ten (10) days to answer.

Entered in Court Journal No. 32, Page 183.

May 25, 1945. [18]

[Title of District Court and Cause.]

ANSWER

Come now George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, defendants above named, and, for answer to plaintiff's Amended Complaint admits, denies, and alleges as follows:

I.

Answering paragraph 4 of said Amended Complaint, defendants admit they employed plaintiffs

to do certain plumbing, steam fitting, and sheet metal work, and to furnish certain materials, including efficient heating plant, to be used in the buildings and improvements situated upon the real property described in said Amended Complaint, for the reasonable price and of the value customarily paid in the Town of Fairbanks, Alaska, for such work and materials, and defendants deny each and every other allegation contained in said paragraph 4. Defendants further allege that plaintiffs were wholly unskilled and inexperienced in the work for which they were employed and were wholly unable to perform the same or to supply the materials for such work, and did not perform the work agreed upon and did not furnish all the materials necessary therefor; that any labor expended upon or materials furnished by plaintiffs on said building at the time and place alleged were a detriment [19] thereto and resulted in the virtual destruction of said building by smearing the interior thereof and all property of defendants therein with oil, smoke, smudge, dirt, and pollution from two separate oil burners which were afterwards discarded by defendants and substitution eventually made for them by defendants at their own expense.

II.

Answering paragraph 5, these defendants admit that the last item of work and materials supplied by plaintiffs was so supplied on the 16th day of December, 1944, and defendants deny all other allegations and each thereof contained in said para-

graph 5, except the allegation that defendants were and are entitled to a credit from plaintiffs in the sum of \$677.46.

III.

Answering paragraph 6, defendants deny that all of the labor and materials furnished by plaintiffs to defendants were used in the betterment and finishing of the buildings, or any of them, located on the premises described in said paragraph 6.

IV.

Answering paragraph 7, defendants deny that the work and labor done and materials furnished by plaintiffs to defendants were done and furnished in compliance with any oral contract between plaintiffs and defendants and defendants allege that the said contract contemplated a good, sound, first class job on the part of plaintiffs and plaintiffs wholly failed to perform their contract in this regard, as heretofore alleged in paragraph I hereof. Defendants further deny that said defendants at any time accepted said job as finished and deny that they then, or at any time, promised to pay therefor the sum herein sued for as the just compensation of said plaintiffs for said work and materials done or furnished by plaintiffs.

V.

Defendants deny each and every allegation contained in paragraphs 9, 10, 11, 12 and 13, and the whole of each of said paragraphs. [20]

Wherefore, having fully answered said Amended Complaint, these answering defendants pray that

plaintiffs take nothing by this action, and that defendants have and recover their costs and disbursements herein.

CECIL H. CLEGG,
Attorney for Defendants George Gilbertson and
Harvey Gilbertson.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Harvey Gilbertson, being first duly sworn, on oath deposes and says: I am one of the defendants in the above entitled action; that I have read the foregoing Answer, know the contents thereof, and the same is true as I verily believe.

HARVEY S. GILBERTSON.

Subscribed and sworn to before me on this 4th day of June, 1945.

[Seal] CECIL H. CLEGG,
Notary Public for Alaska.

My commission expires April 30th, 1946.

(Acknowledgment of Service.)

[Endorsed]: Filed June 4, 1945. [21]

[Title of District Court and Cause.]

REPLY

Come now the above named plaintiffs and for reply to the answer of the defendants George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and allege and state:

1.

They deny that they were unskilled and unexperienced in the work for which they were employed to do. Deny that they were unable to furnish the materials for such work. Deny that they did not perform the work agreed upon. Deny that the labor and material furnished and performed were a detriment to the defendant. Deny that they smeared the interior of said building in any way, and allege the facts to be that they are each experienced in their line of work and did the work in a workmanlike manner, and deny all affirmative allegations of defense set out in said answer.

Wherefore, having fully replied to the answer of the defendants above named, pray that they may recover as in the amended complaint prayed for:

BAILEY E. BELL,

Attorney for Plaintiffs. [22]

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Henry E. Reed, being first duly sworn, on oath, deposes and says: That he is one of the partners of

the above firm which are the plaintiffs above named; that he has read the above reply and knows the contents thereof and that the allegations therein are true, as he verily believes.

HENRY E. REED.

Subscribed and sworn to before me this 7th day of July, 1945.

[Seal] BAILEY E. BELL,
Notary Public in and for Alaska. My commission
expires 1/28/49.

(Acknowledgment of Service.)

[Endorsed]: Filed July 13, 1945. [23]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered That the above entitled cause came on regularly for trial on the 4th day of February, 1946, at the hour of ten o'clock a.m., at which time said cause had been theretofore regularly set for trial, said day being one of the Court days of the General March, 1945, Term of the above entitled Court. Plaintiffs Joseph Lane and Henry E. Reed appeared in person and said plaintiffs were represented by their attorney, Bailey E. Bell. The Defendants George Gilbertson and Harvey Gilbertson appeared in person and by their attorney, Cecil H. Clegg. The Defendant, The First National Bank

of Fairbanks, Alaska, did not appear at said trial. Plaintiffs and defendants George Gilbertson and Harvey Gilbertson announced readiness for trial and the same was thereupon proceeded with. Certain oral testimony and documentary proofs were submitted by plaintiffs in their behalf, who then rested. Said defendants submitted oral testimony and documentary proofs in their behalf and then rested. Whereupon said Court, having considered the proofs and evidence in said cause and the arguments of counsel, and being fully advised in the premises, does now make and enter the following [24]

FINDINGS OF FACT

I.

That between the 16th day of August, 1944, and the 20th day of December, 1944, inclusive, plaintiffs and defendants, George Gilbertson and Harvey Gilbertson, entered into an oral agreement whereby plaintiffs agreed to furnish an adequate first-class heating system for the building of said defendants known as "The Ranch," upon the land described in the Amended Complaint herein, and to install the same in said building, and that said defendants agreed to pay therefor the reasonable and customary value of the same.

II.

That between the 1st day of October, 1944, and the 16th day of December, 1944, plaintiffs installed an alleged heating system in said building; that the same was not adequate to heat said building and

was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of \$195.00.

III.

That said defendants detached from said building and premises, and refused to keep, the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and for which plaintiffs had charged said defendants the sums of \$175.00 and \$100.00, respectively; that said defendants tendered said boiler and oil burner, as personal property, back to plaintiffs, and the same are now their property.

IV.

That between the 16th day of August, 1944, and the 20th day of December, 1944, both dates inclusive, plaintiffs and said defendants entered into an oral contract whereby plaintiffs agreed to furnish and install certain plumbing and sheet metal in said Ranch building, and said defendants agreed to pay therefor the reasonable value thereof. [25]

V.

That, pursuant to said last mentioned agreement, plaintiffs furnished and installed said plumbing and sheet metal in said Ranch Building, the last material being furnished and the last labor in the installation of the same being done upon the 20th day of December, 1944.

VI.

That the reasonable value of said plumbing and

sheet metal and the installation of the same was as shown upon plaintiffs' Exhibit A introduced in evidence herein, to-wit, \$326.79, composed of the following:

Plumbing	\$ 57.00
Well point	8.00
Xzit	2.00
Spray pump	1.00
2-inch coupling	1.10
Fittings	13.30
Ballance on electric range	50.00
Fittings	3.15
Sheet metal	191.24

VII.

That plaintiffs' lien claim in this action having been filed for record upon the 21st day of March, 1945, was filed more than ninety days after the last work or last material was furnished under said contracts, and, therefore, was filed after the time allowed by law for filing such a lien claim.

VIII.

That upon the 24th day of December, 1944, plaintiffs made a service call to adjust or repair the oil burner at said Ranch building and made a charge of \$3.00 therefor; that said charge was not pursuant to the above mentioned contracts, or either of them, and formed no part of the performance of either of said contracts, and no lien claim was filed for said \$3.00 charge.

IX.

That said defendants paid plaintiffs on said con-

tracts or were, by agreement of plaintiffs, allowed the following credits for the following matters, to-wit: [26]

\$250.00 cash paid;

250.00 for bathroom set of defendants delivered to plaintiffs;

50.00 for defendants' hand-fired boiler delivered to plaintiffs; and

60.00 for defendants' material purchased from Paul Palfy and delivered to Plaintiffs.

Total . . . \$610.00

And from the foregoing Findings of Fact, the Court does now make and enter the following

CONCLUSIONS OF LAW

I.

That plaintiffs have no lien upon said Ranch building or premises described in the amended Complaint herein, and that they take nothing by this action.

II.

That said defendants have paid in full all sums owing to plaintiffs upon said contracts.

III.

That said boiler and oil burner which were detached from said heating system by said defendants are the property of plaintiffs.

IV.

That said defendants are entitled to recover from

plaintiffs their costs and disbursements in this action.

V.

That judgment and decree may be entered accordingly.

Done at Fairbanks, Alaska, this 18th day of February, 1946.

HARRY E. PRATT,
District Judge.

Entered in Court Journal No. 33, Page 237, Feb. 18, 1946.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 18, 1946. [27]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL

Comes now the plaintiffs in the above-entitled cause, and moves the Court to set aside the judgment, findings and decision rendered herein on the 14th day of February, 1946, and to grant a new trial for the following reasons, which materially affect the rights of these plaintiffs:

1.

That the Court erred in sustaining the defendants' objections to competent questions, thereby preventing the introduction of competent evidence.

2.

That the Court erred in sustaining objections to identification and exhibits offered on behalf of the plaintiffs, which were competent, material and relevant, and should have been admitted in evidence.

3.

That the Court erred in refusing the numerous offers to prove competent, material and relevant evidence.

4.

That the Court erred in sustaining objections to the offers in evidence of the invoice issued by the plaintiffs, the original of which were delivered to the defendants and the exact carbon copy kept by the plaintiffs as a part of their regular bookkeeping record of the account sued on herein. [28]

5.

That the Court erred in sustaining objections to the introduction in evidence of the original time cards; same being the original and first entry of record of the account sued for herein, and being a part of the bookkeeping system used by the plaintiffs in their place of business at Fairbanks, Alaska, affecting the account sued for herein.

6.

The Court erred in sustaining defendants objections to questions which were competent, material and relevant, and thereby prevented these plaintiffs from making part of their proof of the allegations in the complaint.

7.

The Court erred in finding that the plaintiffs and defendants entered into an oral agreement, whereby plaintiffs agreed to furnish an adequate first-class heating system for defendants' building, known as "The Ranch," for the reason that there were no competent evidence to base such findings on, and was contrary to the great weight of the evidence.

8.

That the Court erred in finding that the plaintiffs did install an alleged heating system in said building; that the same was not adequate to heat the said building and was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of \$195.00.

9.

The Court further erred in finding that defendants detached from said building and premises and refused to keep the same the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and charged defendants therefor the sums of \$175.00 and \$100.00, respectively; that the defendants tendered said boiler and burner, as personal property, back to plaintiffs, and the same is now their property.

10.

The Court further erred in finding that the plaintiffs' lien claim in this action, having been filed for

record upon the 21st day of March, 1945, was filed more than 90 days after the last work or last material was furnished under said contracts and, therefore, was filed after the time allowed by law for filing such a lien claim. [29]

11.

The Court further erred in finding that upon the 24th day of December, 1944, the plaintiffs made a service call to adjust or repair the oil burner at said Ranch and made a charge of \$3.00 therefor; that the same was not pursuant to the above-mentioned contracts or either of them and formed no part of the performance of either of said contracts, and no lien claim was filed for said \$3.00 charge.

12.

The Court further erred in the conclusions of law, number 1 to-wit: That plaintiffs have no lien upon said Ranch or premises.

13.

That the Court erred in conclusion of law number 2 to-wit: That the defendants have paid in full all sums owing the plaintiffffs upon said contracts.

14.

The Court erred in conclusion of law number 3 to-wit: That the defendants are entitled to recover their costs and disbursements in this action.

15.

That the Court erred in the conclusion of law number 4 to-wit: That said boiler and oil burner

which were detached from said heating system are the property of the plaintiffs.

16.

The Court erred in denying the plaintiffs any recovery herein for the reason that there were no competent evidence upon which the Court could base such findings and conclusions of law set forth, and to said findings of facts were against the clear weight of the evidence and against the law controlling in this case.

17.

Plaintiffs therefore move that the Court grant a new trial in the above-entitled cause.

BAILEY E. BELL,
Attorney for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 16, 1946.

[30]

[Title of District Court and Cause]

AMENDED MOTION FOR A NEW TRIAL

Comes now the plaintiffs in the above-entitled cause, and moves the Court to set aside the judgment, findings and decision rendered herein on the 18th day of February, 1946, and to grant a new trial for the following reasons, which materially affect the rights of these plaintiffs;

1.

That the Court erred in sustaining the defendants' objections to competent questions, thereby preventing the introduction of competent evidence.

2.

That the Court erred in sustaining objections to identification and exhibits offered on behalf of the plaintiffs, which were competent, material and relevant, and should have been admitted in evidence.

3.

That the Court erred in refusing the numerous offers to prove competent, material and relevant evidence.

4.

That the Court erred in sustaining objections to the offers in evidence of the invoice issued by the plaintiffs, the original of which were delivered to the defendants and the exact carbon copy kept by the plaintiffs as a part of their regular bookkeeping record of the account sued on herein. [31]

5.

That the Court erred in sustaining objections to the introduction in evidence of the original time cards; same being the original and first entry of record of the account sued for herein, and being a part of the bookkeeping system used by the plaintiffs in their place of business at Fairbanks, Alaska affecting the account sued for herein.

6.

The Court erred in sustaining defendants objections to questions which were competent, material and relevant, and thereby prevented these plaintiffs from making part of their proof of the allegations in the complaint.

7.

The Court erred in finding that the plaintiffs and defendants entered into an oral agreement, whereby plaintiffs agreed to furnish an adequate first-class heating system for defendants' building, known as "The Ranch," for the reason that there were no competent evidence to base such findings on, and was contrary to the great weight of the evidence.

8.

That the Court erred in finding that the plaintiffs did install an alleged heating system in said building; that the same was not adequate to heat the said building and was not a first-class job, but, in fact, was not of any reasonable value **whatsoever, except** the two unit radiators therein which were of the reasonable value of \$195.00.

9.

The Court further erred in finding that defendants detached from said building and premises and refused to keep the same the boiler and oil burner which plaintiffs had installed therein **as a part of** said heating system and charged defendants therefor the sums of \$175.00 and \$100.00, respectively; that the defendants tendered said boiler and burner, as personal property, back to plaintiffs, and the

same is now their property. That such finding is not based upon sufficient competent evidence and is against the great weight thereof.

10.

The Court further erred in finding that the plaintiffs' lien claim in this action, having been filed for record upon the 21st day of March, 1945, [32] was filed more than 90 days after the last work or last material was furnished under said contracts and, therefore, was filed after the time allowed by law for filing such a lien claim.

11.

The Court further erred in finding that upon the 24th day of December, 1944, the plaintiffs made a service call to adjust or repair the oil burner at said Ranch and made a charge of \$3.00 therefor; that the same was not pursuant to the above-mentioned contracts or either of them and formed no part of the performance of either of said contracts, and no lien claim was filed for said \$3.00 charge; that said finding was contrary to the great weight of the evidence and not based upon sufficient competent evidence.

12.

The Court further erred in the conclusions of law, number 1 to-wit: That plaintiffs have no lien upon said Ranch or premises.

13.

That the Court erred in conclusion of law number 2 to-wit: That the defendants have paid in full all sums owing the plaintiffs upon said contracts.

14.

The Court erred in conclusion of law number 3 to-wit: That said boiler and oil burner which were detached from said heating system are the property of the plaintiffs.

15.

That the Court erred in the conclusion of law number 4 to-wit: That the defendants are entitled to recover their costs and disbursements in this action.

16.

The Court erred in denying the plaintiffs any recovery herein for the reason that there were no competent evidence upon which the Court could base such findings and conclusions of law set forth, and to said findings of facts were against the clear weight of the evidence and against the law controlling in this case.

17.

Plaintiffs therefore move that the Court grant a new trial in the above-entitled cause.

/s/ BAILEY E. BELL,

Attorney for Plaintiffs. [33]

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 21, 1946.

[34]

[Title of Cause.]

ORDER

This being the time set for the arguments on the Motion for a New Trial in this cause, Cecil H. Clegg, counsel for the defendants, being present and Bailey E. Bell, counsel for the plaintiffs, not being present, and the Court having considered the plaintiffs' Motion for a New Trial and being fully advised in the premises, it was Ordered that the motion be denied.

Entered in Court Journal No. 33 Page 299. Mar. 15, 1946. [35]

In the District Court for the Territory of Alaska,
Fourth Division

No. 5288.

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of REED and LANE, plumbers, heaters and sheet metal,
Plaintiffs,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as THE RANCH and The First National Bank of Fairbanks, Alaska,
Defendants,

JUDGMENT

Be is Remembered That the above entitled cause came on regularly for trial on the 4th day of

February, 1946, at the hour of ten o'clock, a.m., at which time said cause had been therefore regularly set for trial, said day being one of the Court days of the General March, 1945, Term of the above entitled Court. Plaintiffs Joseph Lane, and Henry E. Reed appeared in person, and said plaintiffs were represented by their attorney, Bailey E. Bell. The defendants George Gilbertson and Harvey Gilbertson appeared in person and by their attorney, Cecil H. Clegg. The defendant, the First National Bank of Fairbanks, Alaska, did not appear in said action. Plaintiffs and defendants announced readiness for trial and the same was thereupon proceeded with. Certain oral testimony and documentary proofs were submitted by plaintiffs in their behalf, who then rested. Said defendants submitted oral testimony and documentary proofs in their behalf and then rested. Whereupon said Court, having considered the proofs and evidence in said cause and the arguments of counsel, and having heretofore made, filed, and entered herein its Findings of Fact and Conclusions of Law, and being fully advised in the premises, [36]

Now, Therefore, By virtue of the law and the premises,

It Is Hereby Ordered and Adjudged That the plaintiffs above named are not entitled to a lien upon the premises of defendants George Gilbertson and Harvey Gilbertson known as "The Ranch," described in plaintiffs' Amended Complaint herein, and that said plaintiffs take nothing by this action.

It Is Further Ordered, Adjudged, and Decreed That said defendants, George Gilbertson and Harvey Gilbertson, have paid in full all sums owing to plaintiffs upon the contracts set forth in plaintiffs' said Amended Complaint herein, and that said defendants have and recover of and from said plaintiffs above named their costs and disbursements herein, taxed by the Clerk of this Court at the sum of \$47.00, and that execution may issue therefor.

It Is Further Ordered, Adjudged, and Decreed That the plaintiffs above named are entitled to the immediate possession of the boiler and oil burner installed by them in the premises of said defendants known as "The Ranch," described in plaintiffs' said Amended Complaint.

Done in Open Court at Fairbanks, Alaska, this 15th day of March, 1946.

HARRY E. PRATT,
District Judge.

Entered in Court Journal No. 33, Page 300. Mar. 15, 1946.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 15, 1946.

[37]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE NINTH CIR-
CUIT COURT OF APPEALS OF THE
UNITED STATES OF AMERICA.

Notice is hereby given that Joseph Lane and Henry Reed the sole owners and doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, the Plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit of the United States of America, from the final judgment entered in the above entitled action, and from the order overruling their motions for a new trial entered in this action on the 15th day of March, 1946, and as grounds of appeal allege that the Court erred as follows:

I.

The Court erred in overruling plaintiffs objections to questions which permitted evidence to be introduced that was incompetent, irrelevant, immaterial and prejudicial.

II.

The Court erred in sustaining objections to plaintiffs questions that were competent, relevant and material, thereby preventing plaintiffs from making proof that was admissible.

III.

The Court erred in refusing plaintiffs offers to prove competent [38] material and relevant matter.

IV.

That the judgment and findings of facts are contrary to the evidence; contrary to the law affecting this case, and against the clear weight of the evidence and the Court erred therein.

V.

The Court erred in overruling the motion for a new trial filed herein.

VI.

Errors of law occurring at the trial on the part of the Court, and excepted to by plaintiffs.

VII.

The Court erred in excluding certain identifications offered in evidence.

BAILEY E. BELL,

Attorney for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 25, 1946. [39]

PETITION FOR ALLOWANCE OF APPEAL

The above named Plaintiffs, considering themselves aggrieved by the Judgment of this Court made and entered herein on the 15th day of March, 1946, and the orders of the Court as set out in the assignment of errors, said judgment being in favor of the Defendant and the judgment overruling the Plaintiff's motion for a new trial and the amended

motion for a new trial, which order overruling said motions was on the 15th day of March, 1946, and from the final judgment denying plaintiffs any recovery and entering judgment for the defendant against the plaintiffs and for all costs.

The Plaintiffs having given due notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit Court of the United States for the reasons specified and set forth in the [223] Assignment of Errors and the Notice of Appeal filed herein do respectfully pray that their said appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said judgment was made and entered be duly authenticated by the Clerk of this Court and sent to the United States Circuit Court of Appeals for the Ninth Circuit of the United States at San Francisco, California, and these said plaintiffs do further pray that said judgment aforementioned be corrected, set aside, reversed, a new trial ordered, and a proper judgment entered for the Plaintiffs herein, and that the Court fix the amount of appeal bond to be filed herein.

Dated at Fairbanks, Alaska, this 4th day of April 1946.

/s/ BAILEY E. BELL,

Attorney for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed April 5, 1946. [224]

[Title of District Court and Cause]

ASSIGNMENT OF ERRORS

Comes Now the above named Plaintiffs and for assignment of errors allege and state:

I.

That the Court erred in sustaining the Defendant's demurrer on May 4, 1945.

II.

That the Court erred in sustaining the demurrer to the Plaintiff's Complaint on the 18th day of May, 1945.

III.

That the Court erred in sustaining the demurrer to the Plaintiff's amended complaint on May 25, 1945.

IV.

That the Court erred in excluding the charge tickets [225] the same being the original entries in a part of the bookkeeping system of the Plaintiff as shown as follows, to-wit:

Testimony of Joseph Lane, Transcript Page four (4) as follows:

There was some errors in the bill, and we had made some mistakes in the bill, so Mr. Gilbertson

and I went over it, and there was some very glaring error in there; and we went over the bill and went over all the materials out there and changed the bill, and I thought that Mr. Gilbertson and I had reached an agreement. At least, when we left each other, why everything was in good shape, so it looked like he was satisfied and so was we.

Q. Did you have anything with you in the way of tickets, time and material tickets with you at the time you went over this bill?

A. Yes we had these tickets here.

Q. Now were those tickets all gone over with Mr. Gilbertson? A. Yes, that's right.

Q. And are those tickets now in the same condition they were at that time?

A. Yes, they are.

Q. Now, what are those tickets? Are they part of the regular records you keep, or the bookkeeping system at your place?

A. Yes, they are part of our time-keeping system. Each man makes them out every night.

Q. Are those the original and first entries made?

A. Yes, that's right.

Mr. Bell: I ask that they be marked as [226] Plaintiff's Identification No. 1. (Time tickets were marked Plaintiff's Identification No. 1 by the clerk of the Court.)

Q. Mr. Lane, when you and Mr. Gilbertson were together and discussing this, did you make some

changes and make some concessions to him there?

A. Yes, that's right.

Q. Will you tell the court what some of those changes were?

A. Well, Mr. Gilbertson had returned some material to us, and we came to an agreement there as to the price of that material. At first he hadn't been allowed enough on the material. There was an error in that, so in talking it over we came to a settlement on the material. I believe the amount was \$60.00 there for returned material. He had returned a bathtub there, a bathtub set that he had wanted to purchase and then changed his mind about it, but he had paid for it, and he was given credit for that; and there was a cash payment there that the bookkeeper had not entered in the files properly, and, consequently, he had not been able to pick it up in the billing. I was present at the time Mr. Gilbertson made that cash payment, and I remembered it, and we counted that up and made allowances for that.

Q. What was the amount of the bill after you and Mr. Gilbertson went over it and reduced it?

A. Well, it was the amount of the lien. I have forgotten now.

Q. Was it the amount that you filed the lien for?

A. Yes, it was.

Q. I believe the lien was filed for \$1429.76 [227] Was that the balance then that—

A. That was the balance at that time, yes.

Mr. Bell: Now, we offer these tickets as being original entries as Plaintiff's Exhibit 1 in evidence.

Mr. Clegg: We object to them, your Honor, unless it is shown that that was a last statement of account that Reed and Lane furnished to Gilbertsons. The witness here testifies that there were some very important changes made in these original bills, so I would not see any use in encumbering the record with all these original bills at this time. We understand that the situation will develop so that in January or February they rendered another bill to Gilbertson, in which they say on the face of it that it supersedes all others that were ever given to Gilbertsons for this alleged work, and we think that is the basis of the suit, if anything. It isn't necessary to go into all these original bills.

Mr. Bell: Your Hon, that's right. He has just stated that this was superseded . . . these were corrected.

The Court: You withdraw them then? You withdraw your offer?

Mr. Bell: No, I offer them, because he says these are the ones that were amended and approved by Mr. Gilbertson.

The Court: I will sustain the objection at present. Exception allowed Plaintiff.

V.

The Court erred in sustaining the objection of the Defendant to material, competent and relevant [228] evidence as follows to-wit:

"Q. Mr. Lane, I mean, you have heard Mr. Clegg's statement about sending him a statement later that superseded all other statements. Who

did that? Did you? A. That is correct, yes.

Q. And is that statement based upon these particular bills as you and George corrected them that day.

Mr. Clegg: Just a moment. We object to that as irrelevant, incompetent, and immaterial and leading.

The Court: The objection will be sustained.

Mr. Bell: Exception.

VI.

The Court erred in sustaining the objection to competent, relevant and material evidence, as follows, to-wit:

Q. What was that statement based upon, the corrected statement that was mailed to him? What was that based upon?

A. That was based upon the adjustments that Mr. Gilbertson and I made on the time cards and on the invoices.

Q. And are these the invoices that are marked Plaintiff's Identification No. 1?

A. Those are the time cards there, yes, sir.

Q. Those are the ones that were before you and Mr. Gilbertson, the ones the adjustments were made on?

A. That's right.

Mr. Bell: I again offer these.

Mr. Clegg: We make the same objection as heretofore without repeating it. [229]

The Court: I don't think these are admissible anyway, unless they form a part of the regular bookkeeping system, and in that case the first record

which takes in all of the items is the correct one to introduce.

Mr. Bell: All right, your Honor, but I thought he would testify they were the first entries, the original entries, in their bookkeeping system.

The Court: Yes, but each one is a separate entry. ("Statement This Cancels and Supersedes All Previous Billings" dated February 19, 1945, was marked Plaintiff's Identification 2 by the Clerk of the court.)

Q. Mr. Lane, I hand you a statement that has been marked Plaintiff's Identification No. 2 and will ask you to state if that is an exact copy of the statement Mr. Clegg referred to as being mailed or being given to the defendant in this case . . . the defendants?

A. Yes that is the amended statement.

Q. Now, is that in the same condition outside of a few pencil marks along the edge, as it was at the time you made the original? A. Yes.

Mr. Bell: Mr. Clegg, do you object to me erasing some of my own notations on the side?

Mr. Clegg: Well, they might as well stay there if you say you made them.

Mr. Bell: I put them there . . . for the record. I now offer it in evidence.

Mr. Clegg: We object to it on the grounds that no contract or agreement has been established as alleged in the complaint, and this, therefore, is [230] incompetent, irrelevant and immaterial. There is no testimony here showing there was any agreement reached as to what the terms of this alleged

contract were, or what was supposed to be done by the plaintiffs in performance of the contract, or what the terms of the contract were.

The Court: The objection will be sustained, exception allowed.

VII.

The Court erred in sustaining the objection to competent, material and relevant evidence as follows, to-wit:

“Mr. Bell: Your Honor, he admits that the last material was furnished specifically in his pleadings on the 23rd day of December in paragraph 2. In paragraph two of his answer he admits that it was that day, and the evidence shows that there was material furnished on the 23rd and the 24th both. Mr. Reed showed some little thing on the 24th even, but the 23rd was the last matter that was stressed, except some small matter on the 24th, but he admits it was furnished on the 23rd, and that, of course, puts it within the period.

Mr. Clegg: If your Honor please, I would like to add a few words in explanation of that and in contradiction of it. It is true, as Mr. Bell states, that the plaintiffs having alleged that the work ceased on the 24th day of December, we admit it. We admit it clearly under mistake and misapprehension and misinformation with reference to the proof. Now they put a witness upon the [231] stand here, and he introduces the absolute records kept by the Plaintiffs in this case which shows conclusively and the testimony of the witness, in addi-

tion, shows conclusively that there was a hiatus between the 15th and 16th day of December up until the 23rd or 24th day of December, which can't be shown except by their own records, and we assumed, of course, that when a matter of that kind is placed in a pleading that it states the truth. Therefore, without wishing to call for an explanation of the books, or, showing of the books of the plaintiffs, the defendants erroneously admit the allegation in the complaint, that the work terminated and the materials ceased to be furnished to this property on the 23rd day of December; but we have now, your Honor, the exact testimony of the people who were supposed to know and who have kept a record of it, and, by their own testimony and by their records, they show that at the time this alleged lien was filed that it was outlawed, and we certainly are not to be prohibited by insisting upon a substantial matter of that kind by an erroneous admission. It is clearly erroneous. It isn't the truth, and that is what we are here for—to ascertain what the truth is, so we ask the court to allow us to amend the answer, if necessary, in that regard, and, instead of admitting that the work ceased, let us stand upon the proposition shown by their own evidence here that the work had ceased long prior to the actual time and legal time fixed by the statute for the filing of this lien. [232]

The Court: You wish to amend that part of your answer, do you?

Mr. Clegg: Yes, sir, and show that we deny that it was filed on the 23rd or the 24th and insert in

place of it the date shown by their own records—that it ended and terminated on the 16th day of December instead of the 23rd or the 24th, whichever the pleadings show.

Mr. Bell: I object to the amendment.

The Court: It may be amended to conform to the evidence.

Mr. Bell: Your Honor, the evidence—I want to call your attention to that—the tickets show that work was done on the 24th and he testified to it.

Mr. Clegg: Your Honor, he said he got a service by telephone to come out there and look at it, and they went out there and charged for one hour's time. That had nothing to do with the original agreement, nothing whatever.

Mr. Bell: He went out there and did the work on the 24th. He went out and fixed something that wasn't working.

The Court: That would be just a repair job. That wouldn't be part of the original contract.

Mr. Bell: The other was within the time, the 23rd is within the time, the material and work furnished on the 23rd.

The Court: The only other, as I recall it, was something on the 20th, the 16th, and the 20th is the very last. [233]

Mr. Bell: Just wait a minute. Let me look at those cards as to dates—here is one for the 27th.

The Court: There was no evidence about it.

Mr. Bell: I offered this, though, in evidence.

The Court: It doesn't make any difference, though. It wasn't received.

Mr. Bell: Now, your Honor, may I reopen my case just to offer these particular cards?

The Court: I will permit you to reopen your case.

Joseph Lane, a witness on behalf of the Plaintiffs, having been already duly sworn, on oath testified on further direct examination by Mr. Bell as follows, to-wit:

Q. I hand you a ticket, which seems to be an invoice marked Plaintiffs' Identification No. 1 in this case, and I will ask you to state if you know who made the call or did the work on that?

A. I did the work.

Mr. Clegg: Just a minute. We object to this your Honor, as supplementary to the prima facie case made by the Plaintiffs and serves to contradict their own testimony and is not permissible as rebuttal evidence, because there is no foundation laid for it, and otherwise it is irrelevant, incompetent and immaterial.

The Court: No foundation has been laid for the use of any such memorandum yet.

Q. Well, is this an original, a part of the original records in your office? A. Yes.

Q. Is that a part of the bookkeeping, general bookkeeping system of your office? A. Yes.

Q. Now, when and under what circumstances are [234] cards like that made?

A. They are made by the man, whoever did the work, at the time the work was done.

Q. And who did the work on the date indicated at the top of this time card? A. I did it.

Q. Did you date it?

A. Yes, I dated it.

Q. Is it in your handwriting? A. Yes.

Q. Now, then, did you at that time go upon the premises of the defendant at the Ranch and do work there? A. Yes.

Mr. Bell: Now, I offer this in evidence.

Mr. Clegg: Just a minute, your Honor. Well, that is the same thing that was introduced here by Mr. Reed: call on burner, labor, one hour, service; it says 'service' and it is dated 12/24/44. That is the very identical thing Mr. Reed was talking about. We ask that it be excluded, your Honor, and disregarded entirely on the ground that it is incompetent, irrelevant and immaterial and has already been testified to by a witness on direct examination, by Mr. Reed on direct examination and cross examination.

The Court: Objection sustained, exception allowed Plaintiff."

VIII.

The Court erred in sustaining objection to Plaintiff's evidence that was competent, relevant and material as follows, to-wit:

"Q. Mr. Lane, what was the occasion for your going out to the Ranch on the 24th day of December, 1944?

A. I was called out there because they were having trouble with [235] the oil burner.

Q. Is that the oil burner you had put in?

A. That's right.

Q. Was that a part of the regular contract work that you had done for them?

A. Well, ordinarily a service call, a service charge, wouldn't have been made there, but, due to the fact that they had taken that burner out themselves and worked on it themselves a few times, we made a service charge on that account, and it was part of the original work.

Q. And did you do the work after you got out there? A. I did, yes.

Q. Have you ever been paid for this work?

A. No.

Q. And this is included in the work that you and George Gilbertson talked over at the time you were going over these tickets?

A. That's right.

Mr. Clegg: We object to that as irrelevant and immaterial.

The Court: Objection sustained, exception allowed Plaintiff."

IX.

The Court erred in sustaining Defendant's objection to material, competent, and relevant evidence offered on the part of the Plaintiff as follows, to-wit:

"Q. Was this ticket present when you and Mr. Gilbertson, George Gilbertson, were going over the charges and the dispute between you as to the charges and the labor done out there?

A. Yes, it was there with the other time cards.

Q. Was it one of the cards that was agreed upon by you and Mr. Gilbertson at that time?

Mr. Clegg: I object to that as incompetent, irrelevant, and immaterial, not proper direct examination at this time, and it is outside of the issues.

The Court: I think it is also incompetent. I will sustain the objection. Exception allowed Plaintiff."

X.

The Court erred in sustaining the defendant's objection to competent, relevant and material evidence, as follows, to-wit:

"Q. You did work on the 24th day of December, 1944, for the defendants in this case?

A. Yes.

Q. And that was the occasion for making this particular charge? A. Yes.

Mr. Bell: We re-offer the card in evidence.

Mr. Clegg: We object to it on all the grounds already stated, your Honor, and that it is not proper rebuttal evidence and that there is no foundation laid for its introduction. It has already been testified to by one of the witnesses on the case in chief. It is incompetent, irrelevant and immaterial.

The Court: Objection sustained, exception allowed Plaintiff.

Mr. Bell: Your Honor, may I say this, please: It is not rebuttal evidence. You allowed me to reopen my case in chief, and this is evidence after you have permitted an amendment in the answer.

The Court: I am not ruling on it on the ground that it is rebuttal. I ruled on it on the other grounds, exception allowed Plaintiff." [237]

XI.

The Court erred in admitting incompetent, irrelevant and immaterial and prejudicial evidence on the part of the Defendant as follows, to-wit:

Q. Now, just describe, if you will, what was the character of the damage to the building caused by these previous burners?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the issues here.

The Court: I think that is without the issues, isn't it? You don't ask for special damages.

Mr. Clegg: We don't ask for any special damages, but I wanted to inform the court as to the character of the damage, or destruction, which these burners caused to the interior of the building, being the burners that were installed by the Plaintiffs in the action, just generally. I don't want to go into the details of it, but I would like to show that it was something more than a mere temporary and trivial destruction, item of destruction.

The Court: Very well, I will permit you to show it.

Mr. Bell: Exception.

XII.

The Court erred in overruling Plaintiff's objection to incompetent, irrelevant and immaterial and prejudicial evidence as follows, to-wit:

Q. Before this occurred, what was the condition of the interior of the building?

A. It was all new.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial, and not within the issues presented. [238]

The Court: Objection overruled.

Mr. Bell: Exception.

A. The building was all new, all varnished.

Q. What did you have to do to get rid of the soot, if anything?

Mr. Bell: I object to it for the same reason.

The Witness: We had to wash the whole interior of the building.

Mr. Bell: And now I move that the answer be stricken. It was given before the court had an opportunity to rule on the objection.

The Court: The motion will be denied.

Mr. Bell: Exception.

XIII.

The Court erred in denying Plaintiff's motion to strike as follows, to-wit:

Mr. Bell: I move to strike all of his testimony about the boiler not working, the burner not working, and the sooting of the place, for the reason that it is outside of the issues, and there is no dispute, there is no contention that it was a contract to do anything except furnish some labor and material; and this is not defensive matter, because if they had made a contract to do some particular thing for a certain amount, it would be an implied warranty that it would work, but there is no testimony of any implied warranty, and I move to strike that part of the answers.

The Court: Motion denied.

Mr. Bell: Exception. [239]

XIV

The Court erred in overruling Plaintiff's objection to incompetent, irrelevant and immaterial and prejudicial testimony as follows, to-wit:

Q. How did that dirt and soot originate? What was the cause of that?

A. I really don't know, only when it would shut down and then start up, it would just blow off the doors, or open, rather, and then just a lot of soot would come out all over.

Q. Was your interior perceptibly hurt?

A. Yes.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the pleadings.

Q. Just generally speaking.

The Court: Objection overruled.

Mr. Bell: Exception.

XV.

The Court erred in overruling Plaintiff's motion to strike all of the evidence with relation to soot or damage as follows, to-wit:

Mr. Bell: Comes now the plaintiff and moves to strike all of the evidence with relation to the soot or damage done to the building for two reasons: One, that it is not within the pleadings, and for the next reason that there has been no proof at all, whatsoever, of any warranty of this old second-hand burner that everyone knew was an old, second-

hand burner that was put in there for a temporary use, and, therefore, it was not guaranteed not to smoke; and it was evidently known that it was defective, or it wouldn't have been installed just for a temporary use until [240] better burners could be obtained. Therefore, I move to strike all of this testimony as to the damage because it would not be binding on these plaintiffs, who didn't warrant this old burner not to smoke.

The Court: Motion denied.

Mr. Bell: Exception.

XVI.

The Court erred in sustaining the Defendant's objection to the Plaintiff's offer to prove as follows, to-wit:

Mr. Bell: Exception. Your Honor, may I make an offer then? I offer to prove by this witness, if he was permitted to testify, that he had a conversation with Mr. Montgomery, who was a regular employee of the defendants in this action, and that in this conversation Mr. Montgomery told him that he had taken this electrode out and worked on it two or three times and that when Mr. Lane examined it, it was broken—the electrode was broken—and that he repaired it; that he did not have a new electrode to substitute or replace this one, and he repaired it so that it worked good at the time and placed it back, and it worked all right at the time. I offer to prove that.

Mr. Clegg: To which we make the same objection as before.

The Court: Objection sustained, exception allowed Plaintiff.

XVII.

The Court erred in refusing the Plaintiff's offer to prove as follows, to-wit:

Mr. Bell: Exception. I offer to prove at this time [241] by this witness, if permitted to testify that when he talked to Gilbertson about taking out the new burner that it was working all right at the time, but Mr. Gilbertson though it was consuming too much oil because it burned too much of the time to keep the boiler hot and wanted a larger burner, and that this witness told Mr. Gilbertson at the time that he had an old burner that he could have for \$100.00, and he would take the new burner out and give him credit for the full \$250.00, the amount he had charged him for the new burner, and then if he could, if Mr. Gilbertson could get a larger burner, any better burner, that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the \$100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work.

Mr. Clegg: To which we object, if the court please, upon the grounds heretofore stated and especially on the ground that it isn't rebuttal testimony, and no foundation has been laid for this question, or series of questions.

The Court: Objection sustained, exception allowed Plaintiff.

XVIII.

The Court erred in making the memorandum as to findings of facts and conclusions of law which is in words and figures as follows, to-wit:

MEMORANDUM AS TO FINDINGS OF FACT
AND CONCLUSIONS OF LAW IN NO. 5288

FINDINGS OF FACT

1. That between the 16th day of August, 1944, and the 20th day of December, 1944, inclusive, plaintiffs [242] and the defendants entered into an oral agreement whereby plaintiffs agreed to furnish an adequate first-class heating system for defendants' building, known as "The Ranch," upon the land described in the amended complaint herein and install the same therein, and the defendants agreed to pay therefor the reasonable and customary value of the same;

2. That between the 1st day of October, 1944, and the 16th day of December, 1944, plaintiffs installed an alleged heating system in said building; that the same was not adequate to heat the said building and was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of \$195.00;

3. That defendants detached from said building and premises and refused to keep the same the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and charged

defendants therefor the sums of \$175.00 and \$100.00, respectively; that the defendants tendered said boiler and burner, as personal property, back to plaintiffs, and the same is now their property;

4. That between the 16th day of August, 1944, and the 20th day of December, 1944, both dates inclusive, the plaintiffs and defendants entered into an oral contract, whereby the plaintiffs agreed to furnish and install certain plumbing and sheet metal in said Ranch, and the defendants agreed to pay therefor the reasonable value thereof; [243]

5. That pursuant to said last-mentioned agreement the plaintiffs furnished and installed said plumbing and sheet metal in said Ranch, the last material being furnished and the last labor in the installation of the same being done upon the 20th day of December, 1944;

6. That the reasonable value of said plumbing and sheet metal and the installation of the same was as shown upon plaintiffs' exhibit "A", to-wit, \$326.89, composed of the following:

Plumbing, \$57.00.

Well point, \$8.00.

Xzit, \$2.00.

Spray pump, \$1.00.

2-inch coupling, \$1.10.

Fittings, \$13.30.

Balance on electric range, \$50.00.

Fittings, \$3.15.

7. That the plaintiff's lien claim in this action,

having been filed for record upon the 21st day of March, 1945, was filed more than 90 days after the last work or last material was furnished under said contracts and, therefore, was filed after the time allowed by law, for filing such a lien claim.

8. That upon the 24th day of December, 1944, the plaintiffs made a service call to adjust or repair the oil burner at said Ranch and made a charge of \$3.00 therefor; that the same was not pursuant to the above-mentioned contracts or either of them and formed no part of the performance of either of said contracts, and no lien claim was filed for said \$3.00 charge;

9. That defendants paid plaintiffs on said contracts or were by agreement of plaintiffs allowed the following claims for the following matters, to-wit: [244]

\$250.00 cash paid;

250.00 for bathroom set of defendants delivered to plaintiffs;

50.00 for defendants hand fired boiler delivered to plaintiffs;

60.00 for defendants' material purchased from Palfy and delivered to plaintiffs;

Total \$610.00.

CONCLUSIONS OF LAW

1. That Plaintiffs have no lien upon said Ranch or premises;

2. That the defendants have paid in full all sums owing the plaintiff upon said contracts;

3. That the defendants are entitled to recover their costs and disbursements in this action;

4. That said boiler and oil burner which were detached from said heating system are the property of the plaintiffs.

XIX

The Court erred in signing and filing the findings of fact and conclusions of law prepared by counsel for the Defendants as follows, to-wit:

In the District Court for the Territory of Alaska,
Fourth Division

No. 5288

Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, Plaintiffs, vs. George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, and The First National Bank of Fairbanks, Alaska, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered That the above entitled cause came on regularly for trial on the 4th day of February, 1946, at the hour of ten o'clock a.m., at which time [245] said cause had been theretofore regu-

larly set for trial, said day being one of the Court days of the General March, 1945, Term of the above entitled Court. Plaintiffs Joseph Lane and Henry E. Reed appeared in person and said plaintiffs were represented by their attorney, Bailey E. Bell. The defendants George Gilbertson and Harvey Gilbertson appeared in person and by their attorney, Cecil H. Clegg. The defendant, The First National Bank of Fairbanks, Alaska, did not appear at said trial. Plaintiffs and defendants George Gilbertson and Harvey Gilbertson announced readiness for trial and the same was thereupon proceeded with. Certain oral testimony and documentary proofs were submitted by plaintiffs in their behalf, who then rested. Said defendants submitted oral testimony and documentary proofs in their behalf and then rested. Whereupon said Court, having considered the proofs and evidence in said cause and the arguments of counsel, and being fully advised in the premises, does now make and enter the following

FINDINGS OF FACT

I.

That between the 16th day of August, 1944, and the 20th day of December, 1944, inclusive, plaintiffs and defendants, George Gilbertson and Harvey Gilbertson, entered into an oral agreement whereby plaintiffs agreed to furnish an adequate first-class heating system for the building of said defendants known as "The Ranch" upon the land described in the Amended Complaint herein, and to install the

same in said building, and that said [246] defendants agreed to pay therefor the reasonable and customary value of the same.

II.

That between the 1st day of October, 1944, and the 16th day of December, 1944, plaintiffs installed an alleged heating system in said building; that the same was not adequate to heat said building and was not a first class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of \$195.00.

III.

That said defendants detached from said building and premises, and refused to keep the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and for which plaintiffs had charged said defendants the sum of \$175.00 and \$100.00, respectively; that said defendants tendered said boiler and oil burner, as personal property, back to the plaintiffs, and the same are now their property.

IV.

That between the 16th day of August, 1944, and the 20th day of December, 1944, both dates inclusive, plaintiffs and said defendants entered into an oral contract whereby plaintiffs agreed to furnish and install certain plumbing and sheet metal in said Ranch building, and said defendants agreed to pay therefor the reasonable value thereof.

V.

That, pursuant to said last mentioned agreement, plaintiffs furnished and installed said plumbing and sheet metal in said Ranch building; the last material [247] being furnished and the last labor in the installation of the same being done upon the 20th day of December, 1944.

VI.

That the reasonable value of said plumbing and sheet metal and the installation of the same was as shown upon plaintiffs' Exhibit A introduced in evidence herein, to-wit, \$326.79, composed of the following:

Plumbing	\$ 57.00
Well point	8.00
Xzit	2.00
Spray pump	1.00
2-inch coupling	1.10
Fittings	13.30
Balance on electric range	50.00
Fittings	3.15
Sheet metal	191.24

VII.

That plaintiff's lien claim in this action, having been filed for record upon the 21st day of March, 1945, was filed more than ninety days after the last work or last material was furnished under said contracts, and, therefore, was filed after the time allowed by law for filing such a lien claim.

VIII.

That upon the 24th day of December, 1944, plaintiffs made a service call to adjust or repair the oil burner at said Ranch building and made a charge of \$3.00 therefor; that said charge was not pursuant to the above mentioned contracts, or either of them, and formed no part of the performance of either of said contracts, and no lien claim was filed for said \$3.00 charge.

IX.

That said defendants paid plaintiffs on said contracts or were, by agreement of plaintiffs, allowed the following credits for the following matters, to-wit:

\$250.00 cash paid;

250.00 for bathroom set of defendants delivered to plaintiffs;

50.00 for defendants' hand-fired boiler delivered to plaintiffs; and

60.00 for defendants' material purchased from Paul Palfy and delivered to plaintiffs.

Total . . . \$610.00

And from the foregoing Findings of Fact, the Court does now make and enter the following

CONCLUSIONS OF LAW

I.

That plaintiffs have no lien upon said Ranch building or premises described in the Amended

Complaint herein, and that they take nothing by this action.

II.

That said defendants have paid in full all sums owing to plaintiffs upon said contracts.

III.

That said boiler and oil burner which were detached from said heating system by said defendants are the property of plaintiffs.

IV.

That said defendants are entitled to recover from plaintiffs their costs and disbursements in this action.

V.

That judgment and decree may be entered accordingly.

Done in open Court at Fairbanks, Alaska, this 18th day of February, 1946.

HARRY E. PRATT,

District Judge.

Entered in Court Journal No. 33, Page 237, Feb. 18, 1946.

(Acknowledgment of Service.) [249]

XX.

The Court erred in rendering the final judgment in this action as follows, to-wit:

In the District Court For the Territory of Alaska,
Fourth Division

No. 5288

Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, Plaintiffs, vs. George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and The First National Bank of Fairbanks, Alaska, Defendants.

JUDGMENT

Be It Remembered That the above entitled cause came on regularly for trial on the 4th day of February, 1946, at the hour of ten o'clock a.m., at which time said cause had been theretofore regularly set for trial, said day being one of the Court days of the General March, 1945, Term of the above entitled Court. Plaintiffs Joseph Lane and Henry E. Reed appeared in person, and said plaintiffs were represented by their attorney, Bailey E. Bell. The defendants George Gilbertson and Harvey Gilbertson appeared in person and by their attorney, Cecil H. Clegg. The defendant, The First National Bank of Fairbanks, Alaska, did not appear in said action. Plaintiffs and defendants announced readiness for trial and the same was thereupon proceeded with. Certain oral testimony and documentary proofs were submitted by plaintiffs in their behalf, who then rested. Said defendants submitted oral testi-

mony and documentary proofs in their behalf and then rested. Whereupon said Court, having considered the proofs and evidence in said cause and the arguments of counsel, [250] and having heretofore made, filed, and entered herein its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

Now Therefore, By virtue of the law and the premises,

It Is Hereby Ordered and Adjudged That the plaintiffs above named are not entitled to a lien upon the premises of defendants George Gilbertson and Harvey Gilbertson known as "The Ranch," described in plaintiffs' Amended Complaint herein, and that said plaintiffs take nothing by this action.

It Is Further Ordered, Adjudged and Decreed That said defendants, George Gilbertson and Harvey Gilbertson, have paid in full all sums owing to plaintiffs upon the contracts set forth in plaintiffs' said Amended Complaint herein, and that said defendants have and recover of and from said plaintiffs above named their costs and disbursements herein, taxed by the Clerk of this Court at the sum of \$....., and that execution may issue therefor.

It Is Further Ordered, Adjudged, and Decreed That the plaintiffs above named are entitled to the immediate possession of the boiler and oil burner installed by them in the premises of said defendants known as "The Ranch," described in plaintiffs' said Amended Complaint.

Done in Open Court at Fairbanks, Alaska, this 15th day of March, 1946.

/s/ HARRY E. PRATT,
District Judge.

Entered in Journal No. 33 Page 300 March 15, 1946.

(Acknowledgment of Service.) [251]

XXI.

The Court erred in overruling the Plaintiff's motion for a new trial on the 15th day of March, 1946.

XXII.

The Court erred in overruling and denying the Plaintiff's amended motion for a new trial on March 15, 1946.

XXIII.

The Court erred in filing and entering judgment for the Defendants on March 15, 1946.

XIV.

The Court erred in the Findings of Fact above set forth and the entering of judgment; in that said findings of fact and conclusions of law and judgment based thereon were not supported by any competent evidence.

XXV.

The Court erred in filing and signing the Findings of fact above set forth and in entering judgment for the defendants for the further reason that it was against the clear weight of the evidence in the

case and contrary to all reasonable and proper deductions based thereon.

For all of which the Plaintiffs believe they have been denied a fair and impartial trial and therefore pray an appeal to the Ninth Circuit Court of Appeals of the United States in said cause.

/s/ BAILEY E. BELL,
Attorney for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed April 5, 1946. [252]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE OF APPEAL on
Defendant First National Bank of Fairbanks,
Alaska.

United States of America,
Territory of Alaska, ss.

J. H. McLean being first duly sworn on oath deposes and says that he is over the age of twenty-one years and competent to be a witness in the above-entitled cause.

That on the 5th day of April, 1946, at Fairbanks, Alaska he served the following designated papers upon defendant First National Bank of Fairbanks, Alaska, by then and there handing E. H. Stroecker, president of said bank copies of the following designated papers, to-wit:

Notice of Appeal to the Ninth Circuit court;

Petition for Allowance of Appeal;

Order Allowing Appeal and Fixing Bond;

Assignment of Errors;

Citation

all of said copies of said papers having been certified to as full, true, and correct copies of the originals on file in this Court and Cause by Bailey E. Bell, attorney for plaintiffs.

Dated at Fairbanks, Alaska, this 5th day of April, 1946.

/s/ J. H. McLEAN.

Subscribed and sworn to before me this 5th day of April, 1946.

[Seal] /s/ J. G. RIVERS,

Notary Public in and for Alaska.

My Comm. Expires 2/18/1950.

[Endorsed]: Filed April 5, 1946. [253]

[Title of District Court and Cause.]

**ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF BOND**

Now on this 5th day of April, 1946, the same being one of the days of the January, 1946, Term of this Court, This Cause came on regularly to be heard upon the petition of the Plaintiffs herein for the allowance of appeal in behalf of said Plaintiffs from the final judgment entered in said cause on

the 15th day of March, 1946, and from the judgment of the Court overruling the motion for a new trial and the amended motion for a new trial on the 15th day of March, 1946, and also fixing the amount of appeal bond on said appeal, and the place of hearing said appeal, and said Court being fully advised in the premises.

Does Hereby Find that the amount of appeal bond should be \$250.00,

Now Therefore, It Is Hereby Ordered that the appeal of said Plaintiffs from the final judgment entered herein on the 15th day of March, 1946, and the judgment of the Court overruling the motion for a new trial and the amended motion for a new trial, said judgment being entered on January 15, 1946, be and the same is allowed to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of the records, proceedings, orders, judgment, testimony, and all other proceedings in said Matter in which said judgment appealed from is based be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before 40 days from this date to be heard at San Francisco, California, and

It Is Further Ordered that the amount of the appeal bond be, and is hereby fixed at the sum of \$250.00, said bond to be submitted and approved by the undersigned Judge of this Court, and

It Is Further Ordered that in preparing and printing the record on appeal in said cause the title of the Court and Cause shall be printed on

the first page of said record, and that thereafter it may be omitted and in its place the words "Title of Court and Cause" may be inserted and that all endorsements on all papers may be omitted except the clerk's filing marks and admissions of service.

Done in Fairbanks, Alaska, on the 5th day of April, 1946.

/s/ HARRY E. PRATT,

District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed April 5, 1946. [255]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents, that we Joseph Lane, Henry Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, Plumbers, Heaters and Sheet Metal, as principals and Henri F. Dale and Marion Brown as sureties are held and firmly bound unto the United States of America in the sum of Two Hundred Fifty (\$250.00) Dollars to be paid to the United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of June, 1946.

Whereas, lately in the District Court of the United States for the Fourth Division of the Territory of [256] Alaska in a suit depending in said Court between Joseph Lane, Henry Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, Plaintiffs, and George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and The First National Bank of Fairbanks, Alaska, Defendants, a judgment was entered against the said Plaintiffs herein, granting to the defendants herein, George Gilbertson and Harvey Gilbertson, a judgment against the Plaintiffs, denying Plaintiffs any recovery and rendering judgment for costs against them, and said Plaintiffs having filed in said Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit at a session of said Court of Appeals to be holden at San Francisco, in the State of California.

Now the conditions of the above obligation is such that if the said Joseph Lane, Henry Reed and Stanley Smith, Partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, shall prosecute said appeal to effect and to pay all costs that may be taxed against them if for any reason the appeal is dismissed, or if the judgment is affirmed, then and in

that event the above obligation to be void, otherwise to remain in full force and virtue.

Signed, Sealed and Acknowledged this 7th day of June, 1946.

REED AND LANE,

Plumbers, Heaters and Sheet
Metal,

By /s/ HENRY E. REED,

Principals.

/s/ HENRI F. DALE,

/s/ MARION BROWN,

Sureties.

[257]

United States of America,
Fourth Division,
Territory of Alaska—ss.

AFFIDAVIT

Henri F. Dale and Marion Brown being duly sworn each for himself, deposes and says:

That he is a free holder in said District and is worth the sum of Five Hundred (\$500.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

/s/ HENRI F. DALE,

/s/ MARION BROWN.

Subscribed and sworn to before me this 7th day of June, 1946.

/s/ BAILEY E. BELL,
Notary Public for the Territory of Alaska. My
Commission expires 1/28/49.

Foregoing Bond is approved.

/s/ CECIL H. CLEGG,
Attorney for Gilbertsons.

Approved this 11th day of June, 1946.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed June 11, 1946.

[258]

[Title of District Court and Cause.]

CITATION

The President of the United States:

To the above named Defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and The First National Bank of Fairbanks, Alaska, and their Attorney of Record, Hon. Cecil Clegg,

Greetings:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, California, pursuant to an order allowing an appeal and entered in the above entitled

action on the 25th day of April, 1946, in which Joseph Lane, Henry Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane plumbers, heaters and sheet metal are plaintiffs and appellants, and George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, and The First National Bank of Fairbanks, Alaska, are Defendants, and Appellees, to show cause, if any there be, why the judgment entered in said cause, on March 15, 1946, in favor of the Defendant above named, and against the above named Plaintiffs, and in the said judgment overruling the motion for a new trial and the amended motion for a new trial, should not be corrected, set aside and reversed and why speedy justice should not be done to Plaintiffs and appellants and defendants appellees above named.

Witness The Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, on this 5th day of July, 1945.

Attest my hand and the seal of the above named Court for the Territory of Alaska, Fourth Judicial District on this 5th day of July, 1946.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed July 5, 1946.

[260]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To John B. Hall, Clerk of the above-entitled Court.

You will please prepare transcript of record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, setting in San Francisco, California, heretofore perfected to said Court and include therein the following papers and records to-wit:

1. Original Complaint.
2. Demurrer.
3. Amended Complaint.
4. Demurrer—5/14/45.
5. Demurrer—5/23/45.
6. Minutes and rulings on Demurrer.
7. Answer of Defendants.
8. Reply of Plaintiffs.
9. The findings of fact and conclusions of law.
10. The motion for a new trial showing the date of filing.
11. Amended motion for a new trial.
12. Order denying motion.
13. Judgment of the Court.
14. Notice of appeal to the Ninth Circuit Court of Appeals.

15. Transcript of Testimony and proceedings before the Court.

16. Affidavid of mailing.

17. Petition for Allowance of Appeal.

18. Assignment of Errors.

19. Affidavit of service.

20. Order allowing appeal and fixing amount of appeal bond.

21. Appeal Bond.

22. Citation on Appeal.

23. Praecipe for transcript of record.

24. Bill of Exceptions.

25. Stipulation granting additional time to file objections and purposed amendments to Bill of Exceptions.

26. Order granting additional time to file, record and docket cause.

This transcript is to be prepared as required by the law and the rules and orders of this Court and of the Circuit Court of Appeals for the Ninth Circuit, and is to be forwarded to the Clerk of said Ninth Circuit Court of Appeals, at San Francisco, California, so that it will be docketed therein on or before the 20th day of July, 1946, pursuant to the order of this Court.

Dated at Fairbanks, Alaska, on this 3rd day of July, 1946.

/s/ BAILEY E. BELL and

/s/ WARREN A. TAYLOR,

Attorneys for Appellants, Joseph Lane, Henry E. Reed and Stanley Smith.

(Acknowledgment of Service.)

[Endorsed]: Filed July 3, 1946. [262].

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

The Plaintiffs respectfully present the following Bill of Exceptions for allowance and settlement upon the appeal taken from the rulings, orders and judgment of the Court as set forth in this Bill of Exceptions and as set out in the Assignments of Errors and Notice of Appeal filed herein, which will be herein presented in the routine and times of the happenings thereof as near as possible, the first of which the Plaintiffs complain as follows:

I.

On March 31, 1945 the Plaintiffs filed their original complaint herein which will be set out in full in the transcript of record and hereby made a part of this Bill of Exceptions by reference. To this Complaint the Defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, filed their demurrer, which

demurrer will be set forth in full in the transcript of record and made a part of the Bill of Exceptions by reference; on May 4, 1945 the Court made an order sustaining said demurrer, said order will be set forth in the transcript of the record and is hereby made a part of this Bill of Exceptions by reference; To this ruling of the Court the Plaintiff's excepted, and an exception was allowed.

II.

Thereafter and on the 9th day of May, 1945, Plaintiffs filed their amended complaint, a copy thereof will be set forth in full in the transcript of the record and is hereby made a part of this Bill of Exceptions by reference; on May 14, 1945 the said defendants filed their demurrer to the amended complaint; Thereafter, on May 15, 1945, the trial Court entered an order sustaining the demurrer and permitted the Plaintiff's to amend by interlineation, a copy of said order will be set forth in the transcript of the record and is hereby made a part of this Bill of Exceptions by reference; Thereafter, on May 23, 1945, the same defendants filed another demurrer to the complaint as amended, a copy of said demurrer will be set forth in the transcript of the record and is hereby made a part of this Bill of Exceptions by reference; Thereafter and on the 25th day of May, 1945, the Court entered an order sustaining the demurrer and gave the plaintiffs permission to amend by interlineation to show Fairbanks is in the Territory of Alaska, a copy of said order will be set forth in

the transcript of the record and made a part of this Bill of Exceptions by reference.

III.

On February 4, 1946 the cause came on for trial and Plaintiffs complain of all of the following proceedings:

One of the Plaintiffs to-wit: Joseph Lane, was called as a witness and testified that he was a member of the partnership of Reed and Lane; that at the time the work was done that is involved in this law suit there was another man by the name of Smith in the partnership, and that he and Reed had since the filing of this suit purchased and took an assignment of all of the interest of Mr. Smith and the partnership now is just Joseph Lane and Henry E. Reed, doing business as Reed and Lane; [264] That he knew George Gilbertson; That he was taken out to Mr. Gilbertson's place by a Mr. Walker of the Walker Construction Company; That George Gilbertson was at that time at The Ranch in the bar room; That was sometime in August, 1944; That at that time he had a conversation with George Gilbertson; That Mr. Gilbertson wanted a steam system put in and was going to put the boiler down in the basement but his basement was flooded; They talked it all over; he advised him to put in a hot water job because that was more economical to operate. Nothing could be done until the basement was dried out. Mr. Gilbertson laid out the fact that he wanted unit heaters there in the bar room and dance hall. He said he would

like to have me do the job when the basement was dry and we could get down in there to do it. I had another conversation with him sometime later about the same thing and then again when we decided to build a lean-to on to the outside of his ranch and put the boiler out in that lean-to. We talked it over and we couldn't get a hot water job in at that time so decided to go ahead and put in the steam job. It wasn't practical to put in a hot water job as laid out then. Mr. Gilbertson sent his man over to haul the boiler, the boiler sections, over to the lean-to, so we could get them set up.

Then this question was asked:

Q. Now, who was to do the supervision of this?

A. Well, there was nothing said about supervision at that time. Later on, though, Mr. Gilbertson had received the bill from Walker with quite a bit of supervision on it, and he told me he didn't want any supervision on that job.

Mr. Gilbertson told him he had been a steam fitter.

Then these questions and these answers given:

Q. And then, Mr. Lane, did you go ahead and put in the work that he asked you to put in?

A. Yes. All I did myself was work on the . . . help set that boiler up. From then on, why, there was a man out there at various times doing the work, and, so far as I know, George told him what to do. He said he didn't want supervision, so I cut it off.

Q. And you furnished the men, and that is all you did after that?

A. I furnished the men and what material Mr. Gilbertson came in and got or one of his men was sent in after.

He then testified that he had a conversation with Mr. Gilbertson about the bill; There was some errors in the bill and we had made some mistakes in the bill so Mr. Gilbertson and I went over it and there was some very glaring errors in there and we went over the bill and went over all the material out there and changed the bill, and I thought that Mr. Gilbertson and I had reached an agreement. At least, when we left each other everything was in good shape, so it looked like he was satisfied and so was we.

Then these question were asked and these answers given:

Q. Did you have anything with you in the way of tickets, time and material tickets with you, at the time you went over this bill?

A. Yes, we had these tickets here.

Q. Now, were those tickets all gone over with Mr. Gilbertson? A. Yes, that's right.

Q. And are those tickets now in the same condition they were at that time?

A. Yes they are.

Q. Now, what are those tickets? Are they part of the regular records you keep, or the bookkeeping system at your place?

A. Yes, they are part of our time-keeping sy-

tem. Each man makes them out every night. [266]

Q. Are those the original and first entries made?

A. Yes, that's right.

Mr. Bell: I ask that they be marked as Plaintiff's Identification No. 1.

(Time tickets were marked Plaintiff's Identification No. 1 by the Clerk of the Court.)

Q. Mr. Lane, when you and Mr. Gilbertson were together and discussing this, did you make some changes and make some concessions to him there?

A. Yes, that's right.

Q. Will you tell the court what some of those changes were?

A. Well, Mr. Gilbertson had returned some material to us, and we came to an agreement there as to the price of that material. At first he hadn't been allowed enough on the material. There was an error in that, so in talking it over we came to a settlement on the material. I believe the amount was \$60.00 there for returned material. He had returned a bathtub there, a bathtub set that he had wanted to purchase and then changed his mind about it, but he had paid for it, and he was given credit for that; and there was a cash payment there that the bookkeeper had not entered in the files properly, and, consequently, he had not been able to pick it up in the billing. I was present at the time Mr. Gilbertson made that cash payment, and I remember it, and we counted that up and made allowances for that.

Q. What was the amount of the bill after you and Mr. Gilbertson went over it and reduced it?

A. Well, it was the amount of the lien. I have forgotten now.

Q. What is the amount that you filed the lien for? A. Yes, it was.

Q. I believe the lien was filed for \$1429.76. Was that the balance then that——

A. That was the balance then at that time, yes. [267]

Mr. Bell: Now, we offer these tickets as being original entries as plaintiff's Exhibit 1 in evidence.

Mr. Clegg: We object to them, your Honor, unless it is shown that that was a last statement of account that Reed and Lane furnished to Gilbertsons. The witness here testifies that there were some very important changes made in these original bills, so I would not see any use in encumbering the record with all these original bills at this time. We understand that the situation will develop so that in January or February they rendered another bill to Gilbertson, in which they say on the face of it that it supersedes all others that were ever given to Gilbertsons for this alleged work, and we think that is the basis of the suit, if anything. It isn't necessary to go into all these original bills.

Mr. Bell: Your Honor, that's right. He has just stated that this was superseded . . . these were corrected.

The Court: You withdraw them then? You withdraw your offer?

Mr. Bell: No, I offer them, because he says these are the ones that were amended and approved by Mr. Gilbertson.

The Court: I will sustain the objection at present.

Q. Mr. Gilbertson, you have heard Mr. Clegg's statement about your later—Exception allowed Plaintiff.

To this ruling Plaintiffs objected.

Then these questions, answer and rulings took place:

Q. Mr. Lane, I mean, you have heard Mr. Clegg's statement about sending him a statement later that superseded all other statements. Who did that? Did you? A. That is correct, yes.

Q. And is that statement based upon those particular bills as you and George corrected them that day? [268]

Mr. Clegg: Just a moment. We object to that as irrelevant, incompetent, and immaterial and leading.

The Court: The objection will be sustained.

Mr. Bell: Exception.

To this ruling the Plaintiffs excepted.

Then the following questions were asked and answers given and rulings by the Court:

Q. What was that statement based upon, the corrected statement that was mailed to him? What was that based upon?

A. That was based upon the adjustments that Mr. Gilbertson and I made on the time cards and on the invoices.

Q. And are these the invoices that are marked Plaintiff's Identification No. 1?

A. Those are the time cards there, yes, sir.

Q. Those are the ones that were before you and Mr. Gilbertson, the ones the adjustments were made on? A. That's right.

Mr. Bell: I again offer these.

Mr. Clegg: We make the same objection as heretofore without repeating it.

The Court: I don't think these are admissible anyway, unless they form a part of the regular bookkeeping system, and in that case the first record which takes in all of the items is the correct one to introduce.

Mr. Bell: All right, your Honor, but I thought he *would* (did) testify they were the first entries, the original entries, in their bookkeeping system.

The Court: Yes, but each one is a separate entry. Exception allowed Plaintiff.

Then the following questions, answers and rulings were had of which these Plaintiff's in error complain: [269]

Q. Mr. Lane, I hand you a statement that has been marked Plaintiff's Identification No. 2 and will ask you to state if that is an exact copy of the statement Mr. Clegg referred to as being mailed or being given to the defendant in this case—the defendants?

A. Yes, that is the amended statement.

Q. Now, is that in the same condition outside of a few pencil marks along the edge, as it was at the time you made the original? A. Yes.

Mr. Bell: Mr. Clegg, do you object to me erasing some of my own notations on the side?

Mr. Clegg: Well, they might as well stay there if you say you made them.

Mr. Bell: I put them there—for the record. I now offer it in evidence.

Mr. Clegg: We object to it on the grounds that no contract or agreement has been established as alleged in the complaint, and this, therefore, is incompetent, irrelevant, and immaterial. There is no testimony here showing there was any agreement reached as to what the terms of this alleged contract were, or what was supposed to be done by the Plaintiffs in performance of the contract, or what the terms of the contract were.

The Court: The objection will be sustained.

Q. What were your agreements with Mr. Gilbertson as to what you were to be paid, if anything, for this work?

A. Well, we didn't make any agreement as to, as to the amount to be paid. It was a cost-plus job, is what it was. It was a time and material job, I should say, because we were just hired to put in that work.

Q. Was anything said about the salaries or wages you were to be paid?

A. No. He did ask me the first time I saw him what our charges, what our regular charge was [270] on labor, and that was about the only thing he asked me.

Q. What did you tell him?

A. I told him at that time it was \$3.00 an hour.

Q. What was said by him then about your going ahead with the work, if anything?

A. Well, he wanted me to go ahead with it, yes. In fact, they sent down three men and insisted on getting the boiler in there. At that time we were very busy; we didn't get at it immediately when he wanted it. That is one of the reasons he sent his own men down after the boiler to haul it up there.

Q. Did you do the work in compliance with his request? A. Yes.

Q. Does this itemized statement, Plaintiff's Identification No. 2, show each item furnished and charged for and all of the labor furnished and charged for in this particular statement?

A. Well, it doesn't show all the materials, but it shows the invoice that lists that particular material, where it doesn't list the material itself.

Q. It does show the invoice capitulation?

A. That's right.

Q. Now, when was this given to Mr. Gilbertson?

A. Well, that was presented to him by Mr. Reed.

Q. You weren't present at that time?

A. No.

Q. Did you talk to Mr. Gilbertson, then, about this particular statement later?

A. No, I never talked to him after that. He and I worked that agreement out, and from then on he talked to Mr. Reed. I didn't have any more dealings with him.

Q. Then you and Mr. Gilbertson, after you had the conference you testified to, you never talked to him any more about the claim? A. No.

Q. I see. Mr. Lane, was the items of labor and material that you have testified about here, were

they all charged at the customary and regular price for labor of that kind in Fairbanks at that time?

Mr. Clegg: Just a minute. We object to that as leading and suggestive and merely a statement of counsel and not from the witness; and we also object to it on the grounds it is incompetent, irrelevant, and immaterial, and there has been no testimony showing or tending to show what character of materials were claimed to have been furnished by the witness, or by his firm, or by Reed, or what materials or labor were accepted and performed for the benefit of the defendants on this property.

The Court: There has been no testimony as to material or what the labor was. The objection will be sustained, exception allowed plaintiff.

He then testified that he knew of his own personal knowledge that the material listed in the identification above referred to was actually used and went into the building involved herein; that he and George Gilbertson went over the list piece by piece, went over the entire building there; went over the hours of labor in the conference, made a few corrections therein. That he kept a labor record and that plaintiffs labor record didn't exactly tally; that he made up the statement that was marked; this statement supersedes all other statements and that that statement is exact and correct as agreed upon between the witness and Mr. Gilbertson; Plaintiff's Identification No. 2 being the statement referred to was then introduced in evidence and is found in the transcript of the record at page 242 and 243 and is in words and figures as follows, to-wit: [272]

STATEMENT

This Cancels and Supersedes All Previous Billings

February 19, 1945

The Ranch, Fairbanks, Alaska.

Sheet Metal	Charges	Credits	Balance
Material and Labor	\$ 191.24	Sheet Metal (Pencil Notation)	
Plumbing			
19 hours labor (Mechanic)			
@ \$3.00	57.00		
Setting up Boiler and Header		(Pencil Notations:)	
62 hrs. labor (Mechanic) 3.00	186.00	by Kleing (Hilary	
65½ hrs. labor (Helper) 2.25	147.38	Evans	
1 hr. labor (Helper) 2.50	2.50	Crollard	
9½ hrs. labor (Mechanic) 3.00		\$ 28.50 Lane	
Hooking up Radiators and Unit Heaters			
109½ hrs. labor (Mechanic) 3.00	328.50		
9 hrs. labor (Helper) 2.50	22.50		
9 hrs. labor (Mechanic) 3.00		27.00	
1 hr. labor (Helper) 2.50		2.50	
(As per agreement)			
Material—Plumbing and Steam			
Fitting	568.13		
(As invoiced—Less Boiler and Burner)			
1 Well Point	8.00		
2 Cans Xsit, 1.00	2.00	George Gilbertson	
1 Spray Gun	1.00	(Pencil Notation)	
2 2" Galv. Couplings, .55.....	1.10		
Assorted Fittings—Inv. 422....	13.30		
Balance on Electric Range—			
Inv. 709	50.00		
Assorted Fittings—Inv. 893....	3.15		
2 Unit Heaters, \$97.50.....	195.00		
1 Williams Oil-o-Matic.....	100.00		
(Price as corrected)			
	\$1,876.80	\$ 58.00	

STATEMENT—(Continued)

This Cancels and Supersedes All Previous Billings

February 19, 1945

The Ranch, Fairbanks, Alaska.

	Charges	Credits	Balance
Balance forward	\$1,876.80	\$ 58.00	
1 Boiler (price as corrected).....	175.00		
1 Thermostat	12.50		
3" Copper Tubing @ .13.....	.39		
1 Adaptor "L"70		
1 Adaptor, Straight45		
1 Pressuretrol	10.50		
Covering Pipes			
6 hrs. labor (Mechanic) 3.00	18.00		
54' Air Cell Covering	12.90		
27' Air Cell Covering		6.48	
1 Reducer (Incorrect Charge)		3.00	
1 Hand Fired Furnace		50.00	
Returned Material		60.00	
(As per agreement)			
Cash on Account			
(11/25/44—Approx.)		250.00	
Cash Sale—Bathroom Set			
(Returned)		250.00	
	<hr/>	<hr/>	
	\$2,107.24	\$ 677.48	
	Balance Due.....		\$1,429.76

(Page 2)

That the statement showed all the charges and credits claimed as well as the balance due thereon.

On cross-examination he testified that he helped to do the work: "There were four of us working on that. That is just setting the base up and setting the boiler on it. It would probably take about two days, about 16 hours for the four men. It would be four times sixteen that it would take in

the way of hours." That he thinks that is about what it took to put it up.

That in the statement "That cancels and supercedes all previous billings" the number of hours that were required to set it up showed sixty-two hours of the labor of a mechanic 65½ hours labor for helper, 9½ hours labor of a mechanic. That that item covered the header. Also, that the header is quite an item on there, it is a four-inch pipe that has to join from one end of the boiler to another, and then the main hooks into the top of it and runs across the side of that lean-to and around the corner in there. And that is bricking up the inside of the boiler as well. That is all included in that item there. (Transcript pages 13 and 14.)

That the statement I made was just setting up the base and setting the boiler on it, was what I said would take about two days. That the job was a straight time and material job. That when a party comes to us and wants us to do work for them and don't want us to state a set contract price but just want us to furnish time and labor (materials) that is a time and material job. In other words we charge them for the time and material. There is no ten per cent plus charged. That the charge shown on the statement (this cancels and supercedes all previous bills) is a proper charge. That the man spent that much time. Mr. Gilbertson sent his own man after lots of the material. Mr. Reed is the plumber. That he had nothing to do with the boiler.

These questions were asked on cross-examination and these answers given:

Q. Now, the next item on here is hooking up radiators and unit heaters, one hundred nine and a half hours labor for mechanic, nine hours labor for helper, nine hours labor for a mechanic, one hour for helper, as per agreement. What is the significance of those words, "as per agreement?"

A. You will notice some of those are not charges; they are credits.

Q. What?

A. If you will read that correctly, some are not charges; some are credits.

Q. Some are credits. There is \$28.50 credit altogether in connection with that particular item which winds up, "as per agreement?"

A. That's right. If you will notice, that correction is on labor there. That is where Gilbertson and I went over the time cards. That is the difference in our figures on the time cards, so I allowed him that much on the labor. I deducted those labor charges on the original account.

Q. You gave him credit for \$28.50?

A. That's right. We deducted it. [275]

Q. Now, what is your statement with reference to this remark here at the bottom of this item, "hooking up radiators and unit heaters," "as per agreement?"

A. That was the agreement that Mr. Gilbertson and I had.

Q. That you had?

A. Yes, that is as Gilbertson and I agreed upon.

Q. Now, when was that agreement and what was the agreement about?

A. The agreement was about the corrections made in the bill.

Q. And you don't show on this bill what the items were that were presumed to be corrected?

A. But they do. That is what I was pointing out to you. The labor was correct there as per agreement.

Q. The labor was corrected as per agreement?

A. Yes, that is right there where you are reading it.

Q. You mean this hooking up radiators and unit heaters, that is the labor that was referred to?

A. You don't make yourself clear. I don't know what you mean.

Q. Well, you insert the statement "as per agreement" at the bottom of this item which consists of these four items that I have read over already and upon which you say there was a credit given by you to Gilbertson of \$28.50. Now, what was these words "as per agreement" referring to. Does that refer to any agreement that was made at the time this work was started?

A. No, it refers to an agreement in the corrections in that particular paragraph that you are reading.

Q. Well, did you make any corrections in the previous items?

A. The ones above there?

Q. Yes.

A. If there was any corrections made, they are shown.

Q. Well, there is nothing else shown till you come to this one which says, "as per agreement."

A. All right, [276] then, there was none others made.

Q. There was no others made?

A. The other items there was correct.

Q. They were correct. Now, will you tell the Court what agreement you made with Mr. Gilbertson at the time you commenced work out there? What was the contract? What were you to do, and what were you to be paid for it?

A. I was to put in a heating system.

Q. What kind of a heating system?

A. A steam-heating system.

Q. A steam heating system?

A. That's right.

Q. And is that what you put in?

A. That is what we put in.

Q. And when did you put in any other system, if you ever did?

A. We never put in any other system.

Q. You have never put in any other system at any other place?

A. I have put in lots of them.

Q. No, I mean here?

A. We never put but one system in there.

Q. How long did it remain there, do you know?

A. So far as I know, it is still there.

Q. It is still there. All you know is you didn't get paid for it?

A. That's right.

Q. Don't you know it was taken out of there?

A. I don't know, no.

Q. You don't know? A. No.

Q. You never did understand that?

A. No. I understood that he was going to take it out and put the boiler in the basement at some future date when I put that one in there. Whether he did or not, I don't know.

Q. How many hours did you work out there yourself? A. Oh, I can't say offhand.

Q. What time did you start?

A. Approximately [277] four or five days.

Q. What time did you start?

A. What time did I start?

Q. Yes, start to work.

A. Well, I started at various times. Sometimes I was only out there an hour at a time.

Q. Yes, but what date did you first start to work on this project, putting in this steam plant?

A. What date did I start to work?

Q. Yes. A. It was in October.

Q. Was that your personal recollection or were you aided by your entries in your bookkeeping system?

A. I was aided by the entries in our bookkeeping system. I don't remember off-hand just what date it was when we started there.

Q. When did you quit and walk away from there? A. When the job was completed.

Q. When was that?

A. Oh, it was in December—late in December.

Q. Late in December?

A. Yes, somewhere around Christmas time.

Q. Well, you put in four days during that period?

A. That's right. Four or five; something like that. I couldn't say offhand.

Q. During the period of two months?

A. Yes.

Q. Well, was there—did you have a substitute up there when you weren't there yourself?

A. I had a man there.

Q. What was the name of the man?

A. There was two of them there at various times. There was a man by the name of Kling who set the boiler up and set up the header and run the main, and Woodcox finished up the job.

Q. Woodcox? A. Yes. Wilcox.

Q. Wilcox? A. Wilcox, yes. [278]

Q. Did they use this boiler during the period from when you commenced work until you say you quit, in the latter part of December?

A. Yes. They used it after we got some of the heaters hooked to it so it could be used.

Q. Did you ever go out there and see it when it was in operation? A. Yes.

Q. How many times?

A. I imagine a half-dozen times.

Q. A half-dozen times? A. Yes.

Q. Do you know the last time you were out there?

A. Oh, I was out there taking material off along in—oh, along in January, I believe. I couldn't say for certain. I have no way of dating that.

Q. Did you have anything to do with putting in an oil system there later? A. Later?

Q. Yes. A. No.

Q. You never?

A. No. We changed one oil burner while we were still working on it.

Q. How is that?

A. We changed the oil burner once at Mr. Gilbertson's request there.

Q. You changed what?

A. We changed an oil burner there at Mr. Gilbertson's request.

Q. You changed an oil burner at Mr. Gilbertson's request? A. Yes.

Q. You placed an oil burner in this boiler——

A. That's right.

Q. ——instead of running this boiler by wood or coal or steam? A. That's right.

Q. How long did you put in time doing that, putting in this boiler?

A. That is included in that price of boiler and header.

Q. It is included in this item, setting up boiler and header? A. That's right.

Q. Where did you get this boiler originally?

A. That boiler came out of the Alaska Airlines.

Q. Alaska Airlines? A. Yes.

Q. Didn't it come out of one of these cleaning establishments?

A. It did not. The cleaning establishments use high pressure steam and those are low pressure boilers.

Q. Low pressure boilers? A. That's right.

Q. Did you get the boiler yourself?

A. I took the boiler out of the Alaska Airlines and replaced it.

Q. Replaced it?

A. I replaced it with another boiler and put that boiler down in Mr. Gilbertson's.

Q. How long had that boiler been in operation and use?

A. It had been in use a good many years. I don't know exactly how long. I never did ask them how long it had been in use.

Q. What kind of a boiler was it?

A. That is an iron sectional boiler.

Q. Did you take it to pieces in order to get it to Gilbertson's and set it up?

A. They have to be taken to pieces.

Q. Well, I am asking you if you did take it to pieces? A. Yes.

Q. And took it out of the Wien Hangar, or some place? A. Alaska Airlines.

Q. Alaska Airlines? A. That's right.

Q. And you took it up to Gilbertson's and set it up? A. Yes.

Q. Did you buy it?

A. Yes. We took it on a trade-in.

Q. On a trade-in? A. Yes.

Q. Did you test it as to its capacity to heat a building of that kind? A. Yes.

Q. Before you set it up?

A. Yes. It is more than [280] sufficient size.

Q. More than sufficient?

A. Yes, it is way over capacity.

Q. How would you describe the capacity of that boiler?

A. Well, it is figured in the number of square feet of radiation it will handle, and that boiler is capable of handling in the neighborhood of twelve hundred square feet.

Q. Well, would it have any particular designation like fifty horsepower?

A. No, it does not. Low pressure, cast-iron sectional boiler is rated in the number of square feet of radiation it will handle.

Q. This boiler you speak about that you bought from this airline outfit, that was about twenty-five years old, wasn't it?

A. No, it wasn't.

Q. It wasn't. I don't think it was. As I say, I don't know, because I didn't ask them.

Q. Well, as a matter of fact, it wasn't sufficient to do the work there it was required to do?

A. It is more than sufficient.

Q. It is a sufficient heating unit in a building like the Ranch Building?

A. It will handle two buildings like the Ranch.

Q. It will handle two buildings like the Ranch?

A. Yes.

Q. And you think it was perfectly satisfactory?

A. It was satisfactory so far as size was concerned. It was satisfactory when I left there.

Q. How about this oil burner that you put in in connection with this boiler? When did you do that work?

A. I did that at the time we set the boiler up, after we had the job far enough along.

Q. Did you commence using it?

A. We used it.

Q. The burner? A. The burner, yes. [281]

Q. And where did you get that?

A. Well, as I said, there was two burners put in there. Now you will have to tell me which one you are talking about.

Q. Well, either one of them, to start with.

A. The first one put in there was new. It was bought in Seattle from LaPere and Walker.

Q. Who got that?

A. What do you mean, who got it?

Q. Did you get it or did Gilbertson get it?

A. We bought it. We did. We bought four of them at that time. We were able to get four. Oil burners were hard to get at the time, and we were able to get four of them at that time, and that was one of the four we got.

Q. Did you install that in the building?

A. Yes, we installed that.

Q. About when would that be?

A. I couldn't say off-hand when it was.

Q. You couldn't even make a guess?

A. Well, I would make a guess for you if you want a guess. It would be along, let me see—it would be along in November, probably the latter part.

Q. Of November? A. Yes.

Q. How long did it remain there?

A. Well, it was in there for a week or two weeks, possibly three weeks, I am not sure.

Q. Why was it taken out?

A. Because Mr. Gilbertson said it was too small.

Q. Mr. Gilbertson said that? A. Yes.

Q. What did you say about it?

A. Well, it could have stood a larger burner, that's true. However, it was doing the work at the time. It ran a good time without shutting off, and that is why he decided it was too small and he wanted it out of there. [282]

Q. What was the difference in the capacity between the first boiler you put in and the second?

A. The second one was quite a bit larger burner.

Q. Did you install that right away after taking out the first one? A. That's right.

Q. How long did that remain there?

A. Well, that was there when I left. That was in there when we completed the job.

Q. Did you furnish that boiler or did Gilbertson furnish it? A. The boiler?

Q. No, this burner I mean.

A. I furnished the burner, yes.

Q. How much did you charge for that?

A. The burner—Mr. Gilbertson and I made an agreement on the burner, and I told him at the time that the burner was an old one and that it was the only burner that was available in town. If he wanted the burner changed and if he wanted this old one that was in poor shape, I would put it in, and, at such time as he or I could get ahold of

another burner, I would allow him the price of that burner back, and that was satisfactory, the \$100.00 with return guaranteed; and when we put another burner in there he was to return that burner and get \$100.00 back.

Q. You mean to tell the Court now that Gilbertson directed you to put in that second-hand burner?

A. That's right. Mr. Gilbertson and I talked it over, and he told me to put it in. I told him the old burner was the only one in town available.

Q. Didn't he tell you, at that time, the burner was too old and would never do the work?

A. He did not.

Q. He did not? A. I told him that——

Q. You told him that?

A. Yes, that it was the only [283] burner available at that time.

Q. Notwithstanding that you put it in?

A. How is that?

Q. Notwithstanding that, you insisted on putting that in?

A. I did not insist on putting that in at all.

Q. But you put it in?

A. I put it in at his instruction.

Q. At his instruction?

A. Yes. He was the one who wanted it in, because the other one was too small.

Q. Now, you are sure about that?

A. I am sure about it.

Q. You first rendered a bill covering these items here to Gilbertsons, with a lot of items in the orig-

inal bill claiming that you bought a lot of things from Palfy and paid for them, didn't you?

A. No.

Q. You didn't do that?

A. You got that backwards. It was Mr. Gilbertson who bought the fittings from Palfy.

Q. Didn't you put them in the bill as though they were paid for?

A. We did not. We made credits for them. He asked us to take them back and give him a credit for it.

Q. He was the man who was directing all this business?

A. That's right.

Q. You weren't using your judgment at all?

A. Mr. Gilbertson instructed me that, after he had trouble with Walker, and Walkers bill had a lot of supervision in it, if he told me once, he told me half a dozen times he didn't want any supervision on that job.

Q. Therefore you let him do just as he pleased?

A. That's right.

Q. You claim no responsibility for anything that happened; is that the situation?

A. Up to a certain point, yes.

Q. Up to a certain point. Now what point was that?

A. Well, if you care to question me on it, I will tell you where I disclaim responsibility.

Q. Well, at what point do you claim that your responsibility was discharged?

A. After the boiler was set up. [284]

Q. After the boiler was set up?

A. Because from then on he instructed me that he wanted no supervision on that job.

Q. Was there anybody else there when he said that? A. I don't remember.

Q. He just said that orally to you?

A. That's right.

Q. You got nothing in writing?

A. That's right.

Q. And at the time when he made those statements, or any statement in that connection, there was nobody present?

A. There probably was, but I don't remember who it was.

Q. You don't remember who it was?

A. There was always somebody around there when I talked to Mr. Gilbertson.

Q. Now, on page two of this statement of yours that is headed, "This cancels and supersedes all previous billings," dated February 19, you have the first item on there as one boiler, and after that in brackets, it says, "price as corrected," one boiler, \$175.00. A. That's right.

Q. Now what was the original price that you had put into your bill, put into your previous bills?

A. There was an error in our other bill. The clerk billed him for \$500.00, and instead Mr. Gilbertson and I had agreed on the price of \$175.00 for that boiler, and the clerk misbilled him for \$500.00, and that was the correction in there.

Q. How did that come to be charged as \$500.00 to start with?

A. I don't know. The clerk—The bookkeeper at that time did it. I don't know why he did it.

Q. Who was the bookkeeper?

A. A man by the name of Calhoun.

Q. Is he here now? A. No, he isn't.

Q. Where is he?

A. You mean is he in town?

Q. Yes. A. Yes, he is.

Q. What did you understand by my question, "Is he here?"

A. I thought you meant was he in the room.

Q. Is that the man who works for Lavery's?

A. Yes, [285] that is the man.

Q. Did you ever ask him why he charged \$500.00 for that item? A. No, I didn't.

Q. You didn't?

A. No. I believe when we corrected that, I believe he had left us.

Q. How much did the boiler cost you?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial.

The Court: The objection will be overruled.

Mr. Bell: Exception.

Q. You may answer.

A. The boiler cost \$175.00.

Q. \$175.00?

A. I might qualify that statement by saying that the boiler that was put in to replace that one cost \$175.00, and that was taken on the trade-in.

Q. Now, just state that again, will you, Mr. Lane?

A. The boiler we bought to put in the Alaska

Airlines to replace that one cost \$175.00, and we took that one in on a trade-in, and, therefore, sold that one for \$175.00.

Q. I see. Further down on page two of this bill which says, "This cancels and supersedes all previous billings," there is an item of one reducer, in brackets, "incorrect charge," \$3.00. How do you interpret that? What does that mean?

A. There is a credit there of \$3.00. The reducer cost thirty cents, and there was an error there in extension. In making the extension, the bookkeeper put it down as \$3.30, and, in going over that bill, why Mr. Gilbertson and I saw that. In fact, Mr. Gilbertson saw it and called my attention to it, so we credited it back \$3.00 to make the price correct.

Q. Did I understand you that you first put in one certain boiler and then took that out and put in another certain boiler?

A. No.

Q. You didn't do that?

A. No.

Q. Oh! I thought in the statement you made just recently you spoke about two boilers.

A. No. I only put in one boiler. [286]

Q. Just the one boiler?

A. That is all.

Q. Well, that boiler that you put in, do you know where it is now?

A. No, I don't.

Q. Weren't you ever notified by Mr. Gilbertson—

A. No.

Q. —as to where it is?

A. No, I wasn't.

Q. You were not. Was your partner, Reed?

A. If he was, he said nothing to me about it.

Q. He said nothing to you about it. Don't you know it was taken out of there and set down outside the Ranch building, and Gilbertson notified

you it was there and, if you wanted it, to come take it away, and you never came after it?

A. I never heard anything about it.

Q. You never heard anything about it?

A. No.

Mr. Clegg: That is all.

Mr. Bell: I believe that is all.

Then Mr. Henry Reed testified that he was a member of the partnership of Reed and Lane, had been at all times since the inception of the firm, he did some of the plumbing out at the Ranch, the rest was done by his employees, he did all of it but five hours, that he charged for the work at the regular and customary charges at Fairbanks Alaska, at that time. He furnished some of the material and some fixtures and charged for the material and fixtures at the customary and regular charge being charged at Fairbanks, Alaska, at that time. That after the job was completed he had conversation with George Gilbertson.

These questions were asked and the answers given as follows:

Q. There is a credit of \$250.00 on here for returned material. What was that for?

A. Well, originally, that was for the purchase of a bathroom set, a complete bathroom set with pre-war fixtures. We purchased the material from the Graehl Circle Bar for \$250.00, and we quoted the price to George, and he was tickled to death to get it, and he paid for it at that time. He [287] was contemplating putting in the plumbing in a house adjoining the Ranch.

Q. Now, did he ever take those bathroom fixtures? A. No, sir, he didn't.

Q. And is that what that credit of \$250.00 is for?

A. That's right.

Q. Now, was the plumbing work that you did there all right? Was it finished when you got done with it, the part you did? A. Yes.

Q. And are the charges you made there correct?

A. That's right.

Q. Now, have you ever talked to him about this bill that supersedes all previous bills? Are you using it, Judge? A. I have a copy, sir.

Q. We have a copy. You may keep that. Did you ever go over that bill with George Gilbertson yourself? A. Yes.

Q. And at what time did you go over it with him?

A. I believe that that was in January, sir. No, I take that back. I think it was after February.

Q. After February. And what was your purpose in going over it with him?

A. There was a lot of errors and mistakes. If I might go back a little bit——

Q. Yes, go back.

A. During the war—at that time, when the war was in progress, bookkeepers were at a premium. The government had taken all clerical help to speak of, and we had a man working for us by the name of Walt Calhoun, and Walt was not a full-fledged bookkeeper. He never professed to be, but he did the best he could, and Walt had taken care of the books to the best of his ability. However, there was

mistakes, which anybody is liable to make. These mistakes were taken up with Mr. Gilbertson by Mr. Lane, and the time cards and everything were gone over, and I went out to see George and Harvey about collecting the account, and at that time we went over it. [288]

Q. Was there any—was there something in there, any plumbing work in there, that he ever kicked about at all, or the charges for the plumbing, at that time?

A. I don't recall that George ever did complain about the plumbing.

Q. He didn't to you, anyway?

A. He didn't to me at all, no.

He then testified that he employed a lawyer and filed a notice of Contractor's Lien, the lien was then identified and introduced without objections which is shown on pages 144, 145, 146, and 147 of the transcript and made a part of this Bill of Exceptions by references; that he had been paid nothing since the filing of the lien; that the amount set forth in the lien was the correct amount of the indebtedness from George Gilbertson and Harvey Gilbertson doing business as The Ranch to himself and partner after all proper credits were given.

On cross-examination he testified that Calhoun was the bookkeeper, he didn't profess to be a full-fledged bookkeeper.

Then these questions were asked and these answers given, as follows:

Q. What difference was there in the bills that

your furnished to Gilbertsons for this work and the revised bill that you say supersedes all others?

A. There is about \$400.00, sir.

Q. Do you mean you increased the amount that you claimed to be due \$400.00, or reduced it?

A. We reduced it, sir.

Q. Isn't it true it is greater than the original bill you sent him? A. No, it isn't.

Q. Did you ever examine the original statement? A. Yes, I have examined it.

Q. And checked it? A. Yes, sir.

Q. I see this statement of account here, which commences November 8 and finishes December 15, is that the one you checked?

A. This is the first bill that was presented, all of our first invoices, sir. This is the first statement that they [289] received.

Q. That you sent?

A. Yes. They were sent all of our first invoices.

Q. You said something in your testimony already about checking this first statement, or checking any statement. Is this the one that you checked?

A. That is the statement that George Gilbertson and Mr. Lane checked.

Q. There is a notation there once or twice, maybe oftener, "checked Geo." Do you know whether that notation on that first bill was put on there by your firm or Gilbertson's firm?

A. It wasn't put on by our firm, sir.

Q. Would you say it was a correct statement?

A. No. No, sir, I wouldn't. That is where the errors were, in that first bill.

Q. Well, do you know, of your own knowledge, when you commenced to work on this project for the Gilbertsons? What date was it, if you know?

A. The only way I have is of checking back, sir. I could check back on the time cards.

Q. Sir?

A. The only way I could tell you would be from my time cards. I could tell you in a minute. It is too long ago to remember the exact date.

Q. Do you know when you quit?

A. We had a small job out there, and it wasn't carried on in consecutive days, so far as my work was done.

Q. Now, I call your special attention to the original bill that you say was tendered and contained errors to the fact that it shows that the last entry apparently made by you against Gilbertson is dated December 15th. Do you know whether that is true or false?

A. No. There was work performed after the 15th.

Q. There was. What was the character of it?

A. I think that was a matter of some——

Q. Sir?

A. I think that was a matter of a range hood.

Q. Range hood?

A. In the kitchen upstairs.

Q. The bill shows there was a range hood, doesn't it? [290]

A. That is true, sir. That was the order for the range hood that was made out on that invoice. The work was never completed until late in December.

Q. Here is an invoice for the installation of the range hood, and it gives the date it was finished. It started 11/3 and finishes 12/13.

A. Which bill are you looking at, sir?

Q. I am looking at this one that says, "Installation of range hood," dated January 8, 1945. It is attached to this general bunch of statements here.

The Witness: May I ask a question, your Honor?

The Court: Surely.

The Witness: Were these time cards entered as an exhibit or not?

The Court: They were marked as an identification. You may refer to them.

A. In refreshing my recollection, I would like to correct my statement about the range hood. It wasn't a range hood. It was making floor flanges for the dance hall, rails in the dance hall.

Q. Rails? A. Yes, sir.

Q. Where does that show on this original bill?

A. They don't have all of them there.

Q. They don't have all of them?

A. No, sir.

Q. Well, what is overlooked?

A. Do you have an invoice 350, number 350?

Q. Wait a minute. There don't seem to be any numbers on here.

A. On the top, sir, in the left-hand corner.

Q. Yes, I got 350.

A. Do you have one for railing?

Q. Railing, did you say?

A. Yes. It would be for railing; it only shows material, but that is what it was made up for.

Q. Will you look there and see if you find it on there? That is 350, isn't it?

A. Yes. Right here, sir—this material here. However, the date of the time card is later than that. [291]

Q. What did you furnish—what I am trying to get at is what did you furnish or do after the date of December 15th or 16th? A. It is right there.

Q. It doesn't show that.

A. It does, sir. It shows labor, and it shows also material.

Q. But you were talking about railing.

A. This material was made up into a rail, and that is where the labor was entailed in it.

Q. Anyway, it was all concluded on December 15th, presumably, from this bill.

A. That is right, presumably from that bill, but the time cards were later than that. The work was done later than that.

Q. Do you have the time card?

A. There is one right there on the 20th.

Q. Was there anything after the 20th?

A. I think there is work on the burner after the 20th. There is one on the 24th.

Q. "Service call on burner labor, one hour." You mean they called up and said there was something wrong with the burner? A. Yes, sir.

Q. You sent a man out there and fixed it, and that is charged up as a part of this contract?

A. That is part of the bills, sir.

Q. Well, do you know anything about what arrangement was made between your firm and Gilbertsons, the defendants, with reference to this contract?

A. We never had a contract, only a verbal agreement with them.

Q. Just a verbal agreement. Didn't you have a cost-plus contract, or some kind of a contract?

A. I don't recall ever having that. They just wanted us to do the work. Under ordinary circumstances, we do that work under time and material.

Q. Didn't you say at one time it was a cost-plus contract?

A. No, sir. We don't operate on a cost-plus basis. [292]

Q. You don't operate on a cost-plus basis?

A. No, sir.

Q. Whatever contract you had with the Gilbertsons in connection with the installation of this heating plant on the Ranch, did it naturally follow that you could charge up to it this call on December 24th as part of the contract?

A. Oh, yes, sir.

Q. You are certain about that?

A. Yes. Any time you get an order through your office, through our office over there, we make a service charge from the shop, which is allowable to us and that is charged from the time we leave the shop until we get back.

Q. Well, would you call it part of the original contract that was entered into to install that plant?

A. We never had a contract. All we had was a time and material job.

Q. Time and material job. So anything that shows up here in the papers, on the pleadings here, that you did have a contract is the bunk?

A. Well, if there is a written contract on it, I never saw it.

Q. You don't mean a written contract necessarily, do you? Any kind of an oral contract would be just as good as a written contract, wouldn't it?

A. We never had an oral contract so far as a set price is concerned. We did have an agreement with the man to do it on a time and material basis. That is an oral agreement.

Q. Wouldn't you call that a contract?

Mr. Bell: I object to that are argumentative.

The Court: I think he is entitled to find out what the witness means by a contract as claimed by his testimony.

A. I would say it is what we could call an order.

Q. An order?

A. An order placed with us to do a certain amount of work, there was not being any question asked as to what the cost will be. To define it, our shop operates—the way we do business over there, if we have a contract, we specify what we [293] will furnish; ordinarily the amount of time it will take for a certain amount of money to be paid a certain way. If we don't have that written agreement, we have an oral agreement that the cost will not exceed so much. If we don't have that, our work is all charged out on a time and material

basis, and I don't really believe it constitutes a contract so far as the plumbing shop is concerned, because he could have stopped or terminated that contract any time he saw fit. It doesn't hinder him from doing as much work as he wants to do on it. Therefore, the responsibility as to the workmanship is ours, but the amount of work is his.

Q. Well, you are prepared to say, now, that you didn't have any contract?

Mr. Bell: I object to that. It is argumentative. He has explained exactly how he was employed, and that is for the court to determine. That is a legal question.

The Court: The objection will be overruled.

Mr. Bell: Exception.

Q. Is that your contention?

A. What was the question again, sir?

Q. I said, your contention is—I don't know exactly what the question was, but I will just re-vamp it and reframe it. Your contention is that you didn't have any contract. Is that right or wrong?

A. I would say that we had an order, what we could classify as an order, from the Gilbertson brothers to do a certain amount of work. There was no written contract, no.

Q. I call your attention to paragraph four of the amended complaint in this case, which apparently you signed on the 9th day of May, 1945, as follows: "Plaintiffs—that is you—further alleges that on or about the 7th day of November, 1944, the defendants, George Gilbertson and Harvey Gil-

Bertson, joint owners and partners doing business as the Ranch, employed these plaintiffs to do certain plumbing, steam fitting and sheet metal work and to furnish certain materials to be used in the buildings and improvements situated upon the hereinafter described premises and property which improvements were then being constructed, remodeled and repaired, [294] and the defendants George Gilbertson and Harvey Gilbertson orally agreed to pay therefor, the customary and reasonable price for the material furnished and the labor furnished and performed. At the special instance and request of the two last named defendants, the plaintiffs did and furnished certain work and labor and certain material in the installation and finishing of the improvements and building on said property and that continuously from the commencement of said work and week by week and month by month, these plaintiffs expended and furnished labor, skill and material which were incorporated in the buildings, improvements, and structures on the above-described real estate; that all of said labor, skill, and materials were incorporated in said structures." Do you want to see this before you answer the question. I am reading you what was set forth here in the amended complaint, signed by you on the date I mentioned. Would you like to see it?

A. No, that is all right, if you read it.

Q. I just did. A. That is right, sir.

Q. With some labor on my part. Now having your memory refreshed by the reading of this statement in the complaint, it is your statement now

that there is, or was not, any contract between you and the defendants with reference to this work?

Mr. Bell: I object to that as having been asked and answered.

The Court: Objection sustained.

Mr. Clegg: That is all, Mr. Reed.

Mr. Bell: That is all.

The Court then recessed and after lunch Mr. Reed was recalled and testified that "When we talked about the bill there was no objection made to the plumbing at that time and he said 'We will skip that, because it is all right. There are only a few hours on it.'" And on recross examination the following questions were asked by Mr. Clegg, and answered by the Witness. [295]

Q. What plumbing are you referring to?

A. The plumbing we did at the Ranch.

Q. All the plumbing? A. Yes.

Q. Including this railing you said you put around the floor, or segregated the dancing space from some other part of the building? Is that plumbing work?

A. Well, it could either be done by a pipe fitter, steamfitter, or plumber—anybody familiar with stock and dies could do that work.

Mr. Clegg: That is all.

Mr. Bell: That is all then.

Warren A. Taylor was then called as a witness and testified that he was a regular licensed lawyer for the Territory of Alaska, practicing at the bar, was familiar with the reasonable and customary

charges for Attorneys in handling cases before this Court. That he understood that this was a lien case; that the amount involved was \$1429.76, and one of the ordinary and regular cases for the foreclosure of liens; that ten or fifteen per cent would be a reasonable fee; that sometimes cases of this kind are settled upon the basis of \$100.00 and ten per cent of the amount involved and the amount recovered.

Then George Gilbertson, one of the Defendants, was called on behalf of the Plaintiff and testified as to the ownership of the property involved which is set forth in pages 46, 47 and 48 and the plaintiffs rested and the defendant moved for non-suit which proceedings are found on pages 48, 49, 50, 51 and 52 of the Transcript of Testimony which is as follows, to-wit:

Mr. Clegg: If the Court please, at this time, on behalf of the defendants and each of them, we move for a non-suit, this action being what is ordinarily called an action for the foreclosure of a lien and is based entirely upon the lien that has been introduced in evidence and testified to by certain witnesses *which has been introduced in evidence and testified to by certain witnesses* and which has been received in evidence. We ask for [296] the nonsuit upon the ground of failure of proof, it having been alleged in the complaint that the last work and/or materials furnished by the plaintiffs was furnished on the 24th day of December, 1944, and the evidence of the plaintiffs having shown conclusively that the work terminated and the furnishing of

materials terminated on the 15th or 16th day of December, and the lien notice introduced in evidence shows that it was not filed or recorded in the office of the recorder of the Fairbanks Precinct until the 21st day of March, which was several days beyond and above the prescribed time of ninety days following the termination of the furnishing of the labor and the furnishing of materials, and, therefore, the filing of the lien at that particular time is a void act on the part of the plaintiffs and was outside of the scope of the law governing the foreclosure and fastening of liens upon real property as established by the law of Alaska. Therefore, no foreclosure can be predicated upon the lien itself, as it is clearly outside the time limit given by the law for the filing and recording of liens.

Mr. Bell: Your Honor, he admits that the last material was furnished specifically in his pleading on the 23rd day of December in paragraph 2. In paragraph two of his answer he admits that it was that day, and the evidence shows that there was material furnished on the 23rd and the 24th both. Mr. Reed showed some little thing on the 24th even, but the 23rd was the last matter that was stressed, except some small matter on the 24th, but he admits it was furnished on the 23rd, and that, of course, puts it within the period.

Mr. Clegg: If your Honor please, I would like to add a few words in explanation of that and in contradiction of it. It is true, as Mr. Bell states, that the plaintiffs, having alleged that the work

ceased on the 24th of December, we admit it. We admit it clearly under the mistake and misapprehension and misinformation with reference to the proof. Now they put a witness [297] upon the stand here, and he introduces the absolute records kept by the plaintiffs in this case which shows conclusively and the testimony of the witness, in addition, shows conclusively that there was a hiatus between the 15th and 16th of December up until the 23rd or 24th day of December, which can't be shown except by their own records, and we assumed, of course, that when a matter of that kind is placed in a pleading that it states the truth. Therefore, without wishing to call for an explanation of the books, or, showing of the books of the plaintiffs, the defendants erroneously admit the allegation in the complaint, that the work terminated and the materials caused to be furnished to this property on the 23rd of December; but we have now, your Honor, the exact testimony of the people who were supposed to know and who have kept a record of it, and, by their own testimony and by their records, they show that at the time this alleged lien was filed that it was outlawed, and we certainly are not to be prohibited by insisting upon a substantial matter of that kind by an erroneous admission. It is clearly erroneous. It isn't the truth, and that is what we are here for—to ascertain what the truth is, so we ask the court to allow us to amend the answer, if necessary, in that regard, and, instead of admitting that the work ceased, let us stand upon the proposition shown by their own evidence here

that the work had ceased long prior to the actual time and legal time fixed by the statute for the filing of this lien.

The Court: You wish to amend that part of your answer, do you?

Mr. Clegg: Yes, sir, and show that we deny that it was filed on the 23rd or the 24th and insert in place of it the date shown by their own records—that it ended and terminated on the 16th of December instead of the 23rd or the 24th, whichever the pleadings show.

Mr. Bell: I object to the amendment.

The Court: It may be amended to conform to the evidence, [298] exception allowed Plaintiff.

Mr. Bell: Your Honor, the evidence—I want to call your attention to that—the tickets show that work was done on the 24th and he testified to it.

Mr. Clegg: Your Honor, he said he got a service call by telephone to come out there and look at it, and they went out there and charged for one hour's time. That had nothing to do with the original agreement, nothing whatever.

Mr. Bell: He went out there and did the work on the 24th. He went out and fixed something that wasn't working.

The Court: That would be just a repair job. That wouldn't be part of the original contract.

Mr. Bell: The other was within the time. The 23rd is within the time, the material and work furnished on the 23rd.

The Court: The only other, as I recall it, was

something on the 20th, the 16th, and the 20th is the very last.

Mr. Bell: Just wait a minute. Let me look at those cards as to dates—Here is one for the 27th.

The Court: There was no evidence about it.

Mr. Bell: I offered this, though, in evidence.

The Court: It doesn't make any difference, though, it wasn't received.

Mr. Bell: Now, Your Honor, may I reopen my case just to offer these particular cards?

The Court: I will permit you to reopen your case.

Thereupon Joseph Lane was recalled and testified as follows:

Q. I hand you a ticket, which seems to be an invoice marked Plaintiffs' Identification No. 1 in this case, and I will ask you to state if you know who made the call or did the work on that?

A. I did the work.

Mr. Clegg: Just a minute. We object to this, your Honor, as supplementary to the prima facie case made by the plaintiffs and serves to contradict their own testimony and is [299] not permissible as rebuttal evidence, because there is no foundation laid for it, and otherwise it is irrelevant, incompetent, and immaterial.

The Court: No foundation has been laid for the use of any such memorandum yet, exception allowed Plaintiffs.

Q. Well, is this an original, a part of the original records in your office? A. Yes.

Q. Is that a part of the bookkeeping, general bookkeeping system of your office? A. Yes.

Q. Now, when and under what circumstances are cards like that made?

A. They are made by the man, whoever did the work, at the time the work was done.

Q. And who did the work on the date indicated at the top of this time card? A. I did it.

Q. Did you date it? A. Yes, I dated it.

Q. Is it in your handwriting? A. Yes.

Q. Now, then, did you at that time go upon the premises of the defendant at the Ranch and do work there? A. Yes.

Mr. Bell: Now, I offer this in evidence.

Mr. Clegg: Just a minute, your Honor. Well, that is the same thing that was introduced here by Mr. Reed: call on burner, labor, one hour, service; it says "service," and it is dated 12/24/44. That is the very identical thing Mr. Reed was talking about. We ask that it be excluded, your Honor, and disregarded entirely on the ground that it is incompetent, irrelevant and immaterial and has already been testified to by a witness on direct examination, by Mr. Reed by direct examination and cross-examination.

The Court: Objection sustained, exception allowed Plaintiff.

Q. Mr. Lane, what was the occasion for your going out to the Ranch on the 24th day of December, 1944?

A. I was called out [300] there because they were having trouble with the oil burner.

Q. Is that the oil burner you had put in?

A. That's right.

Q. Was that a part of the regular contract work that you had done for them?

A. Well, ordinarily a service call, a service charge, wouldn't have been made there, but, due to the fact that they had taken that burner out themselves and worked on it themselves a few times, we made a service charge on that account, and it was part of the original work.

Q. And did you do the work after you got out there? A. I did, yes.

Q. Have you ever been paid for this work?

A. No.

Q. And this is included in the work that you and George Gilbertson talked over at the time you were going over those tickets? A. That's right.

Mr. Clegg: We object to that as irrelevant and immaterial.

The Court: Objection sustained, exception allowed Plaintiffs.

Q. Was this ticket present when you and Mr. Gilbertson, George Gilbertson, were going over the charges and the dispute between you as to the charges and the labor done out there?

A. Yes, it was there with the other time cards.

Q. Was it one of the cards that was agreed upon by you and Mr. Gilbertson at that time?

Mr. Clegg: I object to that as incompetent, irrelevant, and immaterial, not proper direct examination at this time, and it is outside of the issues.

The Court: I think it is also incompetent. I will sustain the objection, exception allowed Plaintiff.

Q. You did the work on the 24th day of December, 1944, for the Defendants in this case?

A. Yes.

Q. And that was the occasion for making this particular charge? A. Yes. [301]

Mr. Bell: We reoffer the card in evidence.

Mr. Clegg: We object to it on all the grounds already stated, your Honor, and that it is not proper rebuttal evidence and that there is no foundation laid for its introduction. It has already been testified to by one of the witnesses on the case in chief. It is incompetent, irrelevant and immaterial.

The Court: Objection sustained, exception allowed Plaintiff.

Mr. Bell: Your Honor, may I say this, please: It is not rebuttal evidence. You allowed me to reopen my case in chief, and this is evidence after you have permitted an amendment in the answer.

The Court: I am not ruling on it on the ground that it is rebuttal. I ruled on it on the other grounds.

Q. Was that work done under the same terms and the same circumstances as all the rest of the work done out there? A. Yes.

Mr. Bell: That is all.

Then on cross-examination Mr. Lane testified as follows:

Q. It was done just about as well as the rest of the work was, too, I suppose?

A. Are you competent to judge?

Q. I am asking you that question and I ask you to answer it.

A. I didn't hear a question. I heard a statement.

Q. Will the reporter please read the question?

(The following question was read by the reporter: It was done just about as well as the rest of the work was, too, I suppose?)

Q. You didn't understand that to be a question?

A. No, I didn't.

Q. You thought I was just talking to hear myself talk, is that it?

Mr. Bell: I object to that as argumentative.

The Court: Objection sustained.

Q. What did you do now—Explain to the Court now what you did in connection with this transaction.

A. I fixed an electrode in there. [302]

Q. How did you fix it?

A. I fastened it back up; taped it back in there.

Q. Taped it back in?

A. That's right.

Q. And that was a week after you had been out there before?

A. Approximately.

Q. Approximately?

A. Yes.

Q. What?

A. Approximately, yes.

Q. And you wrote down, you said, this memorandum on this time card? Did you say that?

A. Yes, I wrote it.

Q. You wrote the word "service" on there, did you?

A. That's right.

Mr. Clegg: That's all.

The following proceedings were then had:

Mr. Bell: Your Honor, I reoffer in evidence, now, all of the tickets, the original time cards, that I have offered before a time or two, on the identification that they have had now.

Mr. Clegg: We renew and ask the privilege of renewing our objections to this offer as it was originally made and originally objected to, and upon the further ground that the main case of the plaintiffs is closed, and the offer now comes too late.

The Court: Objection sustained.

Mr. Bell: Exception. That is all.

The Court: I will overrule the motion for a nonsuit for this reason: that although I believe the evidence failed to prove a lienable claim, they nevertheless would be entitled to a money judgment, even though the lien failed, so that is the ground I will overrule it on.

Then George Gilbertson, one of the defendants, was called and testified in defense that he is in the hotel business now; he has lived in this vicinity about eleven (11) years, became acquainted with the Plaintiffs about the time he hired them to put the plumbing and heating in; the Walker Construction Company, through [303] Mr. Walker brought Mr. Lane out there and introduced him as a plumber and steam fitter. We had the job and we wanted to get done so we hired Lane and Reed and they agreed to put the job in. That he had a boiler out there and some radiators and fittings that we had bought down at a place that had burned up. That Mr. Lane told us that the boiler was not

big enough but he had one that he would sell us: "So Harvey and I go down and look at it with him. He wanted \$175.00 for it, but when we come to pay for it, why it was charged up as \$500.00." This conversation was with Lane. I told him we wanted a heating plant, we wanted a good plant in there. A plant that would keep it warm. It was suggested that a hot water system be used to start with. Mr. Lane claimed—electric unit heaters "That steam or water, whatever you are using, goes through the fans, through the tubes and the fans only—he claimed a hot water system wouldn't work in those unit heaters. So we put steam in there and we got the steam plant sitting out there now. It don't work. It couldn't keep the place warm. It was put in by Lane and Reed. They put a new oil burner in to start with. He was supposed to put in an outfit that would work. It didn't work. We paid part of it at the time and a little here and a little there when they needed some money.

Then this question was asked:

Q. Well, on what basis was he to be paid?

A. Well, there was nothing stated about that.

(Page 60 of Transcript.)

Q. There was nothing stated?

A. Nothing.

Q. Was it a cost-plus basis?

A. Well, I heard Mr. Lane say that this morning. That is the first I knew of it.

Q. What did you understand it was?

A. I understood there was a heating plant to be put in there. So far as I know, when it was

through and finished, and if it was a good job, I would pay for it.

They put the boiler in there. It took about six weeks to. [304] Some men came out there and worked for a short time and go back to town. We had four or five carpenters working out there; they had us tied up all the way through. It was in December when they got the plant working. I could not tell you the date. It never did heat the place. They had an oil burner in there. From what we understood, it was too small. They took it out and put another one in there. I know they had calls on it to go out and repair it but they never did repair it. Harvey bought another outfit from Wilbur's and put another heater in there, or oil burner. (Page 62 of Transcript.) Lane and Reed had two of them. They put a new one in to start with and it run steadily; it didn't cut off so they put this old one in, an old worn out one. Apparently the pump didn't work, and it would explode. It sooted the whole place out there so then Harvey called up Wilburs. He called Lane and Reed. They were out I guess, a time or two. Mr. Reed was out—as a matter of fact, I believe he came down to the hotel to see me and we went out to the Ranch. I believe it was in January, to see if they couldn't make a settlement. Mr. Reed said he would go in and see his partner; that he would rather do that than go to Court. The next day he slapped us with the lien. He never did come back after that. It never worked properly.

These questions were asked and these answers given:

Q. The question is, George, do you know of your own personal knowledge what was the condition of this heating plant at that time?

A. Well, it was unsatisfactory.

Mr. Bell: I move to strike that.

Q. Answer "yes" or "no." Do you know, or don't you know? A. Yes, I do know.

Q. All right. Tell the Court now, what condition it was in.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial, and he has not been shown to be qualified to answer. [305]

A. Well, this oil——

The Court: Just a minute. I don't know just what time you are referring to, Judge Clegg.

Mr. Clegg: The time that he said that they called up Wilbur, at that particular time, because the plant was not working satisfactorily. Now, what time was that?

The Court: Has he shown that a different one was put in?

Mr. Clegg: Yes, he answered that question.

Mr. Bell: Your Honor, I believe Mr. Clegg is wrong. I objected to that question, and you sustained it.

The Court: I don't think there has been any testimony that this witness knows when it was that his brother did call up Wilbur—that he knows of his own personal knowledge.

Q. Do you have any idea when that was?

A. I have no idea. I couldn't say.

Q. Was it before Christmas, or after Christmas?

Mr. Bell: I object to that. He has already answered that he doesn't know.

The Court: Objection overruled.

Mr. Bell: Exception.

A. I wouldn't say.

Q. You wouldn't say. Well, when was it that you found out that it wasn't working correctly and properly?

Mr. Bell: I object to that as assuming a fact that is not in issue.

The Court: Objection overruled.

Mr. Bell: Exception.

Q. Can you state about what time?

A. The date they put steam in the boiler.

Q. The date they put steam in the boiler. Well, they afterwards transformed it into an oil burner, did they?

A. It was an oil burner then.

Q. Huh? A. It was an oil burner then.

Q. An oil burner then. What we want to find out, now, George, is what you know about the defects, the unsatisfactory condition, of this heating plant to do the work it was supposed to do. What was wrong with it to your own knowledge?

A. It wouldn't put out the heat for that building out there. It sooted the whole place up—upstairs, downstairs—and all through.

Q. How long did that continue?

A. Until Wilbur put the new oil burner in there.

Q. Did you furnish the oil burner, or did Reed and Lane furnish it, or did Wilbur furnish it?

A. The last one that went in there, Wilbur put in there.

Q. How is that?

A. Wilbur put the last one in.

Q. Did you furnish it?

A. Harvey did. He bought it from Wilburs.

Q. But Reed and Lane didn't furnish it?

A. No, they didn't.

Q. Well, did that, or did it not, correct the defects in the previous oil burner?

A. It kept the soot down.

Q. It kept the soot down?

A. It didn't soot the place up any more.

Q. Is that the one that is in there now to your knowledge?

A. That oil burner is in that boiler right now, in another boiler.

Q. In another boiler? A. Yes.

Q. Who furnished that other boiler?

Mr. Bell: I object to that as incompetent, irrelevant and immaterial and not within the issues in the case.

The Court: Objection overruled.

Mr. Bell: Exception.

A. Through the Wilson and Wilcox plumbing concern here in town. [307]

Q. What did they have to do with fixing the heating plant, if anything?

A. They changed the whole works around, put in new fittings and a new boiler.

Q. Is that the outfit that is in there now, the heating outfit?

A. That is the one that is in there at the present time.

Q. What did you say their names are?

A. Wilcox and Wilson.

Q. Wilcox and Wilson?

A. I think that is their names.

Q. Huh? I am quite sure that is their names—yes—Tommy Wilson and Whitey Wilcox; I don't know his first name.

Q. Now, just describe it, if you will, what was the character of the damage to the building caused by these previous burners?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the issues here.

The Court: I think that is without the issues, isn't it? You didn't ask for special damages.

Mr. Clegg: We don't ask for any special damages, but I wanted to inform the court as to the character of the damage, or destruction, which those burners caused to the interior of the building, being the burners that were installed by the plaintiffs in the action, just generally. I don't want to go into the details of it, but I would like to show that it was something more than a mere temporary and trivial destruction, item of destruction.

The Court: Very well, I will permit to you to show it.

Mr. Bell: Exception.

Q. Just generally speaking.

A. I understand it cost about \$1000.00 out there to wash the walls.

Mr. Bell: I move to strike what he understands.

The Court: Motion granted. [308]

Q. Just describe what sort of condition it was in.

A. Everything was all sooted up; it was all sooted up.

Q. What do you mean by "everything?"

A. The building, the curtains, and the clothing they had up there in the rooms, tablecloths and all linen; the whole building, in fact.

Q. What kind of linens did you have?

A. Well, it was sort of a linen for the tablecloths; curtains, and their clothing.

Q. Before this occurred, what was the condition of the interior of the building?

A. It was all new.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial, and not within the issues presented.

The Court: Objection overruled.

Mr. Bell: Exception.

A. The building was all new, all varnished.

Q. What did you have to do to get rid of the soot, if anything.

Mr. Bell: I object to it for the same reason.

The Witness: We had to wash the whole interior of the building.

Mr. Bell: And now I move that the answer be

stricken. It was given before the court had an opportunity to rule on the objection.

The Court: The motion will be denied.

Mr. Bell: Exception.

Q. You wait a minute before you answer to give Mr. Bell a proper and full opportunity to make objections and don't answer then before the court rules on them, so we will get along smoother and better all around. You said you had to wash the walls, or something, did you not?

A. Well, yes, they had to wash the walls.

Q. What sort of a job was that? [309]

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the issues.

The Court: The objection will be sustained.

Q. Well, did you have to employ any help to do that?

A. I believe we had about three men out there working.

Mr. Bell: I move to strike that. He said he believes.

The Court: Motion sustained.

Q. Do you know whether you did or not?

A. I know we had them working at washing the walls.

Q. How many people?

Mr. Bell: I object to that unless he knows how many people or who they were.

The Court: I will sustain the objection.

Q. Do you know who they were?

A. No, I don't know. I know the one man was Mr. —, and he had a couple of native women

out there the day I was out there. The one day I was out there there were three. How many we had altogether, I couldn't tell you.

Q. Now in order to clean the place up, was it much of a job?

A. Well, yes. It is a—It is a pretty big job.

Q. How much did it cost you?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the issues.

The Witness: It didn't cost me anything. Harvey paid for it.

The Court: Objection sustained.

Mr. Bell: I move the answer be stricken.

The Court: It may be stricken.

That Reed and Lane billed out the boiler at \$500.00, and afterwards changed it to \$175.00 as previously agreed upon. "My brother and I went down to Reed and Lane Plumbing [310] Shop and asked him about this \$500.00 for the boiler" and "Mr. Lane denied that he agreed to let us have it for \$175.00 so Harvey proceeds to tell him, he wants to know if he went insane, if he couldn't remember the deal we made.

"I never agreed to the correction of the bill; they were going to revise the bills which they did, and they came out more than they were originally. We never did accept the job as finished. We were dealing back and forth, they wanted to force us to the issue on it, and we wouldn't settle with them until they put the heating plant in shape and they never did. Mr. Reed said, "I will grant you took an awful beating here. I will see if we can get

you a new oil burner." That was in January or February some time.

The following questions and answers were given:

The Court: It may be stricken.

Q. Can you briefly itemize the defects in this heating plant as it was left by Reed and Lane?

A. Its defects?

Q. Yes.

A. We had oil burner trouble all of the time.

Q. What about the pump?

A. Well, there was no pump. The pump on the oil burner wasn't working. I guess it is worn out. The oil burner man tells us——

Mr. Bell: I move that be stricken, what somebody else told him.

The Court: It may be stricken.

Q. If there is anything you can state about it within your knowledge, I would like you to inform the court.

A. Well, it had blown the doors off the boiler.

Q. It had blown the doors off the boiler?

A. A number of times.

Q. Huh? A. A number of times.

Q. A number of times. What did you do with reference to repairing it?

A. Well, that Montgomery was in charge of the day shift there, my clean-up man, and he would call [311] up later in the week——

Mr. Bell: I object to him testifying about a conference, about somebody by the name of Montgomery.

The Court: Objection sustained.

Q. Do you know what we are talking about here, of your own knowledge? A. Yes, I do.

Q. Well, did they do anything about repairing it?

A. Well, they worked on it, but never repaired it.

Q. They worked on it, but never repaired it. Now, where is this boiler you are talking about now?

A. It is sitting out there by the side of the building.

Q. Did you, or your brother, to your knowledge, notify Reed and Lane about it?

A. I understand Harvey went down and told them to come down and take the boiler.

Mr. Bell: I move to strike what he understood.

The Court It may be stricken.

Q. Did you do anything personally?

A. I never did nothing in regards to that, no.

Q. Well, Harvey is right here? A. Yes.

Q. The burner as well as the boiler is outside?

A. They are both sitting inside.

Q. They never came after them?

A. They never did.

Q. So far as you know?

A. They hadn't up 'til last night.

Mr. Clegg: That is all.

Mr. Bell: I move to strike all of his testimony about the boiler not working, the burner not working, and the sooting of the place, for the reason that it is outside of the issues, and there is no dispute, there is no contention that it was a contract

to do anything except furnish some labor and material; and this is not defensive matter, because if they had made a contract to do some particular thing for a certain amount, it would be an implied warranty that it [312] would work, but there is no testimony of any implied warranty, and I move to strike that part of the answers.

The Court: Motion denied.

Mr. Bell: Exception.

And on cross-examination he testified as follows:

Q. Mr. Gilbertson, you say you went with Harvey to see this boiler before you put it in out there?

A. Yes, I did.

Q. Where did you go to see it?

A. It was laying down by Lane and Reed's plumbing shop.

Q. Now what was the occasion for going there to see this boiler?

A. Because Mr. Lane told us to come down and look at it.

Q. Did he tell you it was an old one?

A. He did. We could see that.

Q. It showed its age there, didn't it?

A. Well, I don't know nothing about how old it is.

Q. You are a steam fittter, aren't you?

A. I was about fifteen years ago.

Q. You were in good standing as a steam fitter?

A. Yes.

Q. Now, when you saw this boiler, he offered it to you for \$175.00, didn't he?

A. He did.

Q. What would a boiler like that new be worth up here in Fairbanks at that time?

A. At this time of the year?

Q. No, at that time you were talking to them, that they were talking to you, down there?

A. I couldn't tell you.

Q. It would be worth a couple of thousand dollars, wouldn't it?

A. No, absolutely not.

Q. Well, what would it be worth, in your opinion?

A. I don't know.

Q. It would be worth a great deal more than \$175.00 [313] wouldn't it?

A. If it was new, perhaps it would.

Q. Now, did he tell you at that time that this was a second-hand boiler and where he had gotten it?

A. I understood it come out of the Star Airlines Hangar.

Q. Now, it was pretty near impossible at that time, Mr. Gilbertson, to get new equipment here in Fairbanks, wasn't it?

A. We had a boiler out there to put in, and Mr. Lane said it wasn't big enough.

Q. Answer my question. It was pretty near impossible to get a new boiler here at that time, wasn't it?

A. I imagine it was.

Q. And it was pretty hard to get any equipment at that time?

A. You could get any equipment you wanted.

Q. You could?

A. I could.

Q. Why did you buy this second-hand boiler then?

A. I believe you answered that.

Q. You couldn't get a new one, could you?

A. I didn't try to.

Q. You never tried. Now, these oil burners, at the time, they were pretty scarce at that time?

A. No, I believe there was some in town.

Q. Some in town. Now, he first put in a small burner that was a brand new one, didn't he?

A. That's right.

Q. And he told you when he put that in it was pretty small, but he thought it would work all right, didn't he?

A. I don't recall that.

Q. He charged you at that time for the new burner, didn't he?

A. I paid him for it right there.

Q. How much did you pay him for it?

A. I gave him a check; I believe it was \$250.00.

Q. And you were later given credit for the \$250.00 on the statement of account between you people, weren't you?

A. Well, there is some difficulty on them statements there. [314]

Q. Do you have the check with you?

A. I haven't got it with me, no.

Q. The sum was for \$250.00, wasn't it?

A. I believe it was. I believe it was. I am not certain.

Q. Mr. Gilbertson, you saw a paper, a statement, like this only it was white. I believe the statement, the original copy, that they had out at the place was white, was it not?

A. I believe so, yes.

Q. Now, turn over on the second page. You notice a credit for \$250.00 on 11/25/44.

A. Approximately there.

Q. Yes, that is approximately the date. 11/25/44 is the approximate date—for \$250.00. Now, that is the \$250.00 you are talking about paying, isn't it?

A. Like I said, I am not sure what the check was. I said I believe it was about that.

Q. Now, Mr. Gilbertson, your experience as a steamfitter over the years that you were a steamfitter, had taught you something about what would equip your building, hadn't it? You knew pretty well what would equip it?

Mr. Clegg: I object to that as irrelevant and immaterial. It is a proposition, your Honor, where these parties are claiming something for the work, experience, and materials that they furnished and what Mr. Gilbertson, the witness now before the court, knew about it fifteen years ago at some unknown place is wholly immaterial and irrelevant.

The Court: Objection overruled.

Q. The years that you worked as a steamfitter had naturally qualified you to know pretty well what it would take to properly heat your building, hadn't it?

A. Well, I should know a little bit about it.

Q. Now, you saw that boiler before you bought it, didn't you? A. Yes, I did.

Q. And you saw the burner before it was put in, didn't you?

A. I didn't see it until it was laid out there. I

saw it in a box. It was the only time [315] I saw it.

Q. How long was it out to your place before it was put in?

A. Well, it was sitting there quite a few days.

Q. It set there all of the time they were setting the boiler, didn't it? A. No.

Q. Well, how many days?

A. Oh, it was perhaps, say, a week or ten days before it got put in.

Q. Now, do you remember a conversation between you and Mr. Lane about this burner before it was put in? A. Such as what?

Q. Well, did you have a conversation with Mr. Lane about this new burner?

A. All I know is we bought the burner.

Q. Didn't you talk about the burner any?

A. Not that I recall of.

Q. Now, then, you were to pay him \$250.00—or, did you pay him \$250.00 for that burner, didn't you?

A. I believe that was what they charged for it.

Q. Now, after it was in there awhile, that burner didn't soot anything up, did it?

A. It didn't heat the boiler.

Q. Wasn't your complaint, Mr. Gilbertson, that it had to run too much of the time, or practically all of the time, to keep the boiler hot?

A. Well, it was running practically steadily.

Q. It did keep the boiler hot when it did run practically steadily; didn't it?

A. Well, yes and no.

Q. Well, now, did you set a radiator yourself there? A. Yes, I did.

Q. Now, that wasn't set by Mr. Lane, was it?

A. No, it wasn't.

Q. Now, did you have any trouble with the radiator out there not heating, and then have a conversation with Mr. Lane about it?

A. We put the one in first, and then, after the plant was in and working, they put another unit heater in there. I don't know nothing about these unit heaters.

Q. You don't know who put the unit heaters in?

A. Lane [316] and Reed put the unit heaters in.

Q. You say when they revised the bill it was more. You do remember that the reason was that these unit heaters had been shipped up from Seattle to the depot and were taken directly from the depot to your place and used, and that wasn't in the original bills?

A. I don't know whether they were billed there or not.

Q. Will you take that bill and see if you can find those unit heaters in there, please? I am asking you, Mr. Gilbertson, about this itemized statement that you testified was changed. You have it there. Please check it and see if there is any unit heaters charged in that statement?

A. I believe that Mr. Lane and Mr. Reed brought that up and had it charged.

Q. Will you look through there and see if there is any charge to you in that whole bill for the unit heaters? A. I don't see them on there.

Q. You don't see them on there. I will ask you if on this statement, if they are not on the corrected statement, this bill being, "This cancels and supercedes all previous billings." You do find the two unit heaters in there, don't you?

A. That is not an itemized statement.

Q. Well, they are charged as \$97.50 each, \$195.00? A. \$195.00.

They were not on that statement?

A. I believe there was something brought up about those. I am not certain what that was.

Q. You and Mr. Lane talked that over, didn't you? A. I believe it was Mr. Reed.

Q. Now, I notice that you have totaled—is that your figuring on the front: \$2382.81? Is that your figures?

A. I wouldn't say, but I could tell you.

Q. You think if you added those three adding machine slips, you would get this \$2382.81?

A. I am sure these are——

The Court: Just a minute. Will the witness get on the stand?

A. I am sure them are not my figures. [317]

Q. Now, will you please check the totals on the two and see if the one on your knee isn't twenty-one hundred and some dollars, the total charges out there, twenty-one hundred and some dollars?

A. Yes, but the credits are \$677.48.

Q. Then what does the yellow slip show as the balance due, the little yellow slip on your leg?

A. The last?

Q. Yes.

A. According to their figures, it is \$1429.76.

Q. Well that is less than the figures that you have on the ticket in your left-hand, isn't it?

A. There is no credits on these, you see.

Q. There are no credits on them. Taking the credits off, even that is less; it is about \$400.00 less if you consider the unit heaters, isn't it, Mr. Gilbertson?

A. No, I won't say that it is.

Q. Well, twenty-three hundred and some dollars on one and twenty-one hundred on the other, and the last one, twenty-one hundred, has the two unit heaters in it of \$195.00, don't it?

A. To tell you the truth about it, the way they have it mixed up, I don't know how anybody would understand it.

Q. Are you a bookkeeper, Mr. Gilbertson?

A. No, I am not.

Q. Do you know where it says "credit" and "charges" and "balance" up at the top there, at the top of the page, where they start off?

A. We have two credits here.

Q. I mean this, starting right there. Now, you have a number of credits under the column for credits, don't you?

A. I see that.

Q. Now then, the balance that that itemized statement shows is fourteen hundred and how much?

A. It says here \$1429.76, according to Lane and Reed's figures.

Q. \$1429.76. You had a statement like that before you when you and Mr. Lane were in a conference together, didn't you?

A. No. Mr. Reed.

Q. You first had one, you and Mr. Reed, and had these tickets?

A. Mr. Reed, not Mr. Lane, brought this out to the Ranch.

Q. You and Mr. Lane had these tickets before you?

A. No [318] he brought this statement here with him and we checked those.

Q. And you checked those tickets?

A. We checked them.

Q. There were some credits allowed on account of some error, wasn't there?

A. I could see stuff I purchased other places, at Palfy's plumbing shop, Wilburs' plumbing shop, the N. C. Company, and the Sampson Hardware, which Lane and Reed had charged out against us again.

Q. You were given credit for \$60.00 that day for the return of some stuff that you had bought from Palfy?

A. Palfy, the N. C. Company, Wilbur and Sampson Hardware.

Q. And that \$60.00 was agreed upon between you and Mr. Lane that day?

A. Lane and Reed just took all the fittings out there at that place and took them to town.

Q. How much was that?

A. I don't know.

Q. They took what was out there?

A. They took what was out there, what we had there ourselves.

Q. You and he agreed on an adjustment of \$60.00 credit?

A. He said he would allow \$60.00. I don't know what he took, but I know he got \$60.00 worth.

Q. Did you agree to the \$60.00?

A. I did. There was nothing else to do.

Q. All right, sir. Did you ever call Reed and Lane to come out there about anything when they didn't come?

A. Yes, I did. I called them time and time again when they were working on the job, supposedly.

Q. Did you ever call Mr. Lane and talk to Mr. Lane about this heating system not working when he didn't come to see it?

A. No, I didn't myself.

Q. You didn't yourself?

A. My brother was out there. He took care of that.

Q. Now, this burner that is charged at \$100.00, and you are credited for \$250.00 for the return of the new burner, was the \$100.00 burner an old burner?

A. Well, they charged me for two [319] burners.

Q. You are credited with one at \$250.00?

A. That one we paid for.

Q. And you are only charged on the ticket there with one burner, aren't you?

A. We are charged out with two, I believe.

Q. No, this ticket that you and Mr. Reed went over, the corrected statement?

A. This is the one he brought out to the Ranch, the copy of this one.

Q. That one charges you with only one burner at \$100.00, doesn't it?

A. Yes, that's right, I believe.

Q. And it says, "as agreed." Now, that was a used burner, wasn't it? A. Yes, it was.

Q. It was an old one, wasn't it?

A. I understand it was.

Q. Now, that was a pretty good sized burner, wasn't it? It was rather large?

A. I don't know anything about oil burners.

Q. But it was larger than the small one you had in it to start with, wasn't it?

A. It looked like it was large.

Q. When it was working, it heated the boiler adequately didn't it?

A. When it did work, yes.

Q. You didn't know that was a second-hand, old burner at the time you had him take the old one out and put a new one in?

A. My brother called them up and had them bring this other burner out there, because the other one would not keep the boiler warm.

Q. Now, when did you leave out there and go to your other business in town?

A. They took over the 1st of December.

Q. The first day of December, 1944?

A. That's right.

Q. So the work done from then on, what matters that were handled out there, were handled with Harvey, isn't that right?

A. That's right, sir.

Q. All right, now, he did correct that charge, that original billing of \$300.00 for this boiler? He agreed to reduce that to \$175.00 on that ticket, didn't he? [320]

Mr. Clegg: I object to that as already having been testified to.

The Court: Objection sustained.

Q. Now, when you hired them to do the work out there, it was—they didn't made a contract to furnish you any particular thing or to do any particular thing? You hired them to go out there and work at so much an hour and furnish certain materials?

A. He had us charged up, to start with, on supervision, and we had that cut off.

Q. Where is that?

A. He had that on his own ticket. He had supervision charged at \$3.50 an hour, if I remember right.

Q. Then you did have an agreement with him about supervision, didn't you?

A. There was no agreement. I was dealing with Mr. Lane entirely.

Q. You were dealing with Mr. Lane entirely?

A. That's right.

Q. What did you tell Mr. Lane about supervision?

A. I called him up. He was giving us, just like the Walker Construction Company give us, a little run-around out there. They agreed to do a job for \$1000.00, and we ended up paying \$1700.00. I told

him, "Don't go pulling a Walker Construction trick on us, because we won't agree to it."

Q. Then did you explain to him what you meant? Did you talk to him about supervision?

A. He tore those cards up; I believe he did, because he never charged us out with it after that.

Q. Mr. Gilbertson, you told him you didn't want to be charged any more with supervision?

A. We didn't feel like paying three and a half an hour for supervision.

Q. Mr. Lane, then, never charged you any more for supervision?

A. Well, he said this morning that he charged his own labor up.

Q. It was just his labor, wasn't it.

A. He charged his labor up, yes.

Q. Now, then, Mr. Gilbertson, you had someone out there keeping time, too, in the matter, did you not?

A. Yes, we did [321] that.

Q. You and Mr. Lane checked those two records against each other?

A. We did that.

Q. And he allowed you nine hours that your account didn't show, and he took off nine hours and gave you a credit for \$27.00, didn't he, on that ticket so it would match your charge?

A. He took off \$27.00 one place and \$28.50 one place and \$2.00 another.

Q. Now, then, when he took those off that would leave the tickets, then, credited with the hours that you had, according to your record?

A. It still doesn't correspond.

Q. Well, you had your books and his together

when those credits were made, didn't you? These tickets and your tickets were all there, weren't they?

A. He did take his own card. "Well," he said, "I won't run those through on the charge, then." That was \$3.50 for supervision; I believe it was three dollars and a half.

Q. He took those off and gave you credit for them, didn't he?

A. There is a \$58.00 credit here for his labor, I guess it is.

Q. Well, there is nine hours of labor, \$3.00 an hour, for a mechanic, isn't it? Doesn't it show there?

A. Nine hours and one-half one place, and nine hours another place.

Q. Nine hours for a mechanic, at \$3.00 an hour, \$28.50?

A. Nine and a half hours.

Q. Nine and a half hours?

A. \$28.50.

Q. That is a credit to you, isn't it, under the column of credits?

A. There is a \$58.00 credit there.

Q. Then there is a \$2.50 credit for a helper, one hour for a helper, two and a half?

A. Total, \$58.00.

Q. Now, he consented to give you that credit because of the difference in your time-keeping and his time-keeping, didn't he?

A. Apparently he did, yes.

Mr. Belly: That is all.

Mr. Clegg: That is all.

Then Harvey Gilbertson was called and testified

in his own [322] behalf that was interested in The Ranch close to Fairbanks; that he knew Reed and Lane; that he had business dealings with them in 1944 from October or November that they were to put in a heating plant; that he worked at the ranch all the time; "We had to have a heating plant and went to them about it; they said they would put one in; they did it, but it never did work. They put in a boiler and an oil burner to heat it and some radiators and pipes. We already had those but some of them I guess they furnished, those that were shipped up here. They were what you would described as electric unit heaters. I guess they were through, but it was never working when they did get through. I found that out as soon as they started the outfit out because it was supposed to be complete but it wouldn't work.

Then this question was asked (Transcript page 90):

Q. What was wrong with it briefly?

A. I don't know. I just don't know much about it myself.

Q. You don't know much about it yourself. Well, what effect did it have on the interior of your building, if any?

A. Well, it dirtied it all up.

Q. How much and how badly?

A. Well, I don't know; just soot all over the building, all over our clothes, and all over things in the dining room and everything.

Reed and Lane were informed of the condition

they came out and adjusted it a few times, four or five times, it made it worse I believe; about the same I believe. The first one was a small burner, it didn't heat the place, the second one was larger, it didn't heat it either, and that is the one that caused all the dirt and soot.

Then this question was asked:

Q. How did that dirt and soot originate? What was the cause of that?

A. I really don't know, only when it would shut down and then start up, it would just blow off the doors, or open, rather, and then just a lot of soot would come out all over. [323]

Then the following questions and answers and proceedings were had:

Q. Was your interior perceptibly hurt?

A. Yes.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the pleadings.

Q. Just generally speaking.

The Court: Objection overruled.

Mr. Bell: Exception.

Q. Just briefly; don't go into the details.

A. Well, it just dirtied the place all up.

Q. Was it slight or trivial? A. Very bad.

Q. What? A. Very bad, yes.

Q. What did it require you to do?

A. Get a lot of help and wash it all down and clean it all up and send the clothes and everything to the laundry and cleaners.

Q. Then after you got that done, did they do anything more to it?

A. No, I didn't do that until after we got that burner out of there, because there was no use. There was nothing we could do. We took some of our things out of there.

Q. What about—did you have to take the burner out, you say? A. Yes.

Q. Then what?

A. Well, I called them several times to come and fix it, and they never did, and it didn't seem like they could, so I got to work. There was no use; I couldn't keep on going forever, so I called another oil burner man.

Q. Who?

A. Mr. Wilbur, and we had there the fellows who were working for him, and they came out.

Q. What did they do, if anything?

A. They put in a new burner.

Q. A new burner? A. Yes.

Q. How did it work after that?

A. Well, there wasn't any soot, but it just didn't make the place warm enough.

Q. It wasn't efficient in heating the place?

A. That's [324] right.

Q. What did you do after that?

A. Well, it finally winds up having to have a whole new system put in.

Q. Who did that for you?

A. Wilcox and Tommy Wilson.

Q. About when? A. This last fall.

Q. Last fall. Do you mean in December?

A. No, earlier than that.

Q. What? A. Earlier than that.

Q. Earlier than that?

A. Before the cold weather set in.

Q. Before the cold weather. Was that an efficient heating outfit?

Mr. Bell: I object to that as calling for a conclusion of the witness. He has not shown himself competent to testify as to whether it was or wasn't.

The Court: Objection sustained.

Mr. Clegg: He can tell whether he was freezing to death or not.

The Court: Objection sustained.

Q. How did the one work that Wilcox and Wilson put in? A. It works very good.

Q. Is it there now? A. Yes, sir.

Q. What did you do with the old plant, if anything? A. It is still sitting out there.

Q. Where?

A. Well, in the addition that we built to put it in.

Q. Did you do anything about notifying Reed and Lane about it? A. Yes.

Q. What?

A. Well on the burner, when we first took that out, I called them a couple times to come and get it, so they didn't; so then I went to them when I got this other system in and went to the store there and told them to come and get the boiler if they wanted it, so he said, well, he didn't want it.

Q. They didn't want it?

A. Yes. "Well," I says, "It is [325] no use to me. Somebody might be able to use it." "Well,"

he says, "we will come to take it and give you credit for it." But they never did come.

Q. It is still out there, you mean?

A. Yes.

Q. How much did you pay for that boiler? What did they charge you, I mean?

A. Well, at first it was \$175.00 and then \$500.00, and then back to \$175.00 again.

Q. Did you at any time agree with them as to the amount to be paid for their services?

A. No.

Q. Did you, at any time, accept the work that they did out there as a finished job?

A. No, sir.

Mr. Bell: I object to that as a conclusion. The circumstances would control.

The Court: Objection overruled.

Mr. Bell: Exception.

Mr. Clegg: You claim that in your papers, in your pleadings.

Q. You never did have any agreement to that effect with either of them? A. No.

Q. Speak a little bit louder, please.

A. No, I never did agree to it that it was finished. I tried to get them to come out and fix it some way, so it would give us some heat.

Q. Was that before you finally had Wilson and Wilcox work on it? A. Yes.

Q. Who were they? What did they do?

A. Well, after they didn't come, I just had them come out and see what they could do.

Q. Who are they?

A. Well, they are two plumbers that got a shop here. I think they have a shop here. I have never been in it.

Q. Well, they are in the business——

A. Yes, sir.

Q. ——of heating? A. That's right.

Mr. Bell: I object to that. He says they were plumbers. [326]

Q. Do you know anything about what their occupation is, what they do?

A. Well, I guess they put in heating plants—plumbing.

Mr. Bell: I move to strike that he guesses. He says he guesses.

The Court: All right: It may be stricken.

Q. What did they do for you?

A. They put in a heating plant.

Q. A good or bad one? A. A good one.

Q. That is the same one you are now using?

A. Yes, sir.

Mr. Clegg: That is all.

On cross examination Harvey Gilbertson testified as follows:

Q. Mr. Gilbertson, you stated that it was put in in 1944 by Reed and Lane, didn't you?

A. Yes.

Q. And you used that up until the fall of 1945, you say? A. Well, we did, yes.

Q. Now, Harvey, did this—does this burner that you have in there now, is it the same size as the small burner that you had when Reed and Lane put it in the first time? A. I really don't know.

Q. Well, does it look about the same to you?

A. I haven't any idea, because it has been gone for quite a while. I never saw the two together.

Q. Now, do you know whether it was you or George, or who was it, had the men change the small burner for the old second-hand burner?

A. Well, I think George was the one who had most of the doings of that.

Q. Well, Harvey, you knew when they put that old burner in there that was a second-hand burner, didn't you?

A. Yes.

Q. And they only charged you \$100.00 for it?

A. I believe that's right.

Q. And I believe they told you if you didn't like it they would give you a \$100.00 credit?

A. They agreed to put in a [327] new burner as soon as they could get one.

Q. You didn't pay them and you got in a lawsuit, isn't that right?

A. Yes, that's right. We wanted some heat. If they had fixed the heating plant, we would have paid them.

Q. They offered to take the old burner out at any time they could get one big enough—you or they, either one—and they would take it back and give you a full \$100.00 credit for it?

A. That's right.

Q. And this fuss came up and you wouldn't pay them?

A. No.

Q. And they got in a lawsuit and filed a lawsuit against you?

A. No, not until they wouldn't come out and do

anything about fixing the burner. Everybody else had burners.

Q. You don't know where the burner came from that the other people got, do you?

A. No, I don't.

Q. Now, you did use this one for a year?

A. Well, not quite a year.

Q. Well, you used it from—it was put in out there on October 10th or 12th, wasn't it?

A. Well, we didn't start using it until December because we were closed down for quite a while while they were putting it in.

Q. Now, this burner you got in out there now is new equipment, a full new outfit, isn't it?

A. Well, it is the same burner that Wilbur put in the old boiler. It is the same burner.

Q. It is a new burner, thought, isn't it?

A. It was, yes.

Q. What kind of a boiler do you have out there now?

A. I don't know what you would call it.

Q. Is it any larger than the old one?

A. No, it isn't as large.

Q. It isn't quite as large even, it is?

A. No.

Q. And Mr. Wilbur put that in for you?

A. No, sir.

Q. Who did put that in?

A. The boiler? Wilcox and Tommy Wilson.

Q. Is that a new boiler that is in out there now?

A. I believe it is.

Q. A new burner and new boiler?

A. The burner was used in the old boiler for awhile. I bought it from Wilbur.

Q. Do you remember what you paid for the new burner?

A. I believe the burner was—I believe it was \$182.00 or \$185.00.

Q. Do you know what you paid for the boiler, the new boiler?

A. Well, that was put in with the job, on this job that they did.

Q. What did they charge you for putting that in?

A. The complete job, I believe, was \$1255.00, something like that.

Q. Was that boiler approximately \$1000.00?

A. No, that included all of the work and everything.

Mr. Bell: That is all.

Mr. Clegg: That is all.

Mr. R. H. Heider was then called to testify for the defendant and was interrogated by Mr. Clegg; He testified that his name was R. H. Heider, was an oil burner mechanic, lived in Slaterville, 407 Minnie, lived in Fairbanks almost three years, worked for the Engineers at Ladd Field and for the Alaska Road Commission and for himself, and some work for Wilbur, oil burner work, setting up oil burners. He knew the plaintiffs in the case, knew the defendants did work for Gilbertsons while he was employed by Wilbur in the latter part of February or the 1st of March, 1945; he put in a new burner in the boiler, cemented it in and run a small

amount of cement around the base of the boiler where soot had come out and that was all. The boiler was on a small base he noticed the crack about three-eighths of an inch, or one-half of an inch, he took cement and run it around the boiler to seal that crack up to keep the soot from coming out. He saw the boiler three or four times, possibly a half dozen times. He could not tell whether sealing had been placed originally on the boiler. He shortened it and narrowed it slightly approximately four inches on each face. He felt that in putting in a different burner that he needed a different size fire box so he changed it; [329] made it a little smaller to fit the tip that he had. He took the burner out that was in there, put a new one from Wilburs in and started it up (Transcript 101) "I know nothing about the boiler, only the burner. The boiler so far as I know is primarily a coal burning boiler and is was attempted to be transformed into an oil burner. It took me three hours to change it, to change the burner, and then I went back two or three times for a period of ten or fifteen minutes each time just to see how it was working. I was taken upstairs and shown what the condition was all through the house, part of the building, the living quarters and dining room, I went down and looked at the boiler and attempted to seal it against blowing further soot in case the burner did do it. It was soot from the boiler. It was the only place it could come from the boiler and the burner. The soot was on the walls, on the window sills, tables and table cloths and different furnishings. It was

sooted up you could see it. There was soot all around the place, there was no other place that I know of, no other stove that could have put it and it was thicker in the boiler room than anywhere else.

Then on cross examination he testified:

That he worked out there the latter part of February or the first of March, just replaced the burner, he had nothing to do with the boiler, no knowledge of it. Knew nothing of boilers, only burners, not a steamfitter. "I don't know anything about boilers, I am no steamfitter at all. I am a technical engineer, architects and draftsman. Don't belong to any mechanic's union. The burner I took out was an oil burner, the physical dimensions of the whole burner was larger than the new. He testified that he was an automobile mechanic.

Merele Wilcox testified on behalf of the Defendants, that he lived at 214 66th in Fairbanks, ever since 1943, was formerly employed by Reed and Lane, plumbers and heating company. He is now working for himself at 1506 Third, has a partner by the name of Tom Wilson doing business as Economy Plumbing and Heating. He knows the Plaintiffs Reed and Lane, had worked for them; knows the Defendants Gilbertsons, has known them about the same length of time he knew Reed and Lane. He worked on the Ranch job for Reed and Lane toward the last part of the job. He was supposed to be a fitter. Wilson is a plumber. He was working for Reed and Lane, he hooked up some

radiators and return lines. He examined the boiler and the boiler itself was all right so far as he knew, it was not a new boiler, it was a used one. He sealed it up, the sections of the boiler. There was a pump on the burner in poor condition, the burner wasn't in too good a shape, he just disconnected the pump and run it through without the pump. He hauled it out there in a pick-up, it was stored in the Nazarene Church.

Then these questions were asked and these answers given:

Q. At the time you put in this burner, did you think it was fit and serviceable for the job it was expected to perform.

A. Well, the burner itself wasn't what, wasn't up to snuff. That is, it wasn't like a new burner. It was an old burner, and the way I understood it—of course, I was just working there; I didn't handle any of their business, or anything—but it was a temporary set-up, so far as I know. I don't know the full details of it though (Page 108 Transcript).

Q. Do you think it was competent to perform the work that it was required to do.

A. Well, the burner was large enough to handle the job if it was working properly. The way things turned out, it just didn't work right. Once or twice—or, how many times I don't know; I wasn't there—I know it didn't operate properly at all times.

Then on cross examination he testified that it was the understanding it was to be used as a temporary

burner until a better burner could be obtained. He put the large burner in [331] there, adjusted it to the best of his ability it was an old burner at the time; the new burner was taken out before he started to work. He didn't remember who took the old burner out. The boiler so far as working right was alright. The trouble with the burner was that it was just too old. That it was just put in there for temporary use and when a better burner could be obtained it would be taken out and a new burner put in.

Tom Wilson was called and testified for the Defendants: That his business is plumbing and heating. His shop is at 1513 Third; Mr. Wilcox is a partner, the witness who just left the stand. "We are in our fourth month's business." Has recently done work out at The Ranch, put in a heating system there. Got through on or about the 16th of December. We used the unit heaters and radiators, we made a deal on the boiler, it was accepted. We put a brand new boiler in there. Personally, I am not a fitter.

Then these questions were asked and answers given (Transcript Page 112):

Q. What was the matter with the one that was in there, if anything?

Mr. Bell: We object to that as assuming a fact not in evidence, that there was anything the matter with it.

The Court: Objection overruled.

A. They claimed it wasn't heating properly.

Mr. Bell: I move to strike that; they claimed it wasn't heating properly.

The Court: It may be stricken.

Q. Don't you know generally ? You don't have to go into any great details. From your examination of the heating plant there, what was wrong with the boiler?

A. Well, personally, I am not a fitter; I don't know.

Q. You couldn't say? A. No, sir.

Q. Did you examine it?

A. I never paid any attention to it, it just was there. [332]

Q. Well, who determined to take it out?

A. The Gilbertsons.

He further testified that they wanted a system that would work; that the two of them put in the burner and the boiler; that the boiler was new; the system after put in worked good, made several trips out to verify it, everything was going along fine. Don't know the difference in capacity of the old one and the one we put in. The old one looked awful big to me. I just fixed a few leaks so far as the plumbing end was concerned. The burner we put in is using less than half of what the other one did. Four more radiators were put in.

On cross examination he testified:

We put in a hot water system. You don't have to be a steamfitter to put that in, plumbers do it. We put it in the basement of the same building. I formerly worked for Reed and Lane. I believe Mr. Lane is a good mechanic, the boiler he put in could

be used either for steam or hot water, it was about one third as big as the old boiler.

On recross examination he testified:

There are probably more sectional boilers installed by plumbers than by fitters, and so far as this boiler is concerned I would install a little bit smaller one with three men in a day. I have done that. It would depend on what kind of equipment you use as to whether or not it would take one hundred hours.

W. A. Montgomery was called and testified for the Defendant:

That he had been in Fairbanks since the 4th of April two years ago. He knew Reed and Lane, knew the Gilbertsons since the 10th of May two years ago, knows the Ranch outside of town. Has had connection with the enterprise out there. Was carpenter and bartender, and overseer at times, plumber, cement man, Jack-of-all trades, just a small amount of plumbing experience, hooking up toilets, casings, sinks and one thing or another. I have done no extensive work at it. Have met Reed and Lane several times, remembered when they worked out there. Couldn't remember the dates but they worked in November and December, 1944, putting [333] in a steam heating plant, observed the amount of time they put in from November 30, to December 5th along in there, kept track of their time, they had one or two and sometimes three men there. I think five was the most men they had there. I don't think it was over two days that they had

five men. Saw Lane off and on. His time out there varied with the different times he would come out to see about and do. Heard Mr. Reed's testimony about a rail that his firm put around the place there for dancers. Didn't see Reed do it. Stated he did it. It was just a one-half inch pipe around the band, the orchestra, a pipe railing around the band, something like this raised place here. The rail is two feet high. It is still there. So far as I knew he was the only man that worked on it.

On cross examination he testified (Transcript 121):

The pipe and fittings came from Reed and Lane plumbing shop, it was all short lengths, I think it was only two pieces of pipe that they cut. Reed and Lane furnished the fittings that went in this railing. It is a flange of some kind in the front. They furnished these flanges too. There were six galvanized floor flanges bought, but only five used. There was some three-fourths inch galvanized tees used, two and one-half inch galvanized L's used also, there were twenty-four feet of one-half inch black pipe used, this was prepared and turned over to the witness down at Reed and Lane's shop, it took about two hours to put it up. That he made a list of the time used by the men and his list and Reed's time cards, or Lane's time cards were gone over by George Gilbertson and Lane together, they said they did. He wasn't present when they went over them.

Then Jack Wilson was called and testified for the

Defendants; He testified that he lived at 704 Thirteenth, town of Fairbanks, since '43. Came from Juneau, contractor and builder, worked for Gilbertsons out at the Ranch in 1944. Had some men out there at the time, was remodeling the interior, had between four and five men, and it gradually ran down to two, was carrying on his work while Reed and Lane were installing the heating plant. Was there some of the time while they were installing the heating plant. They were not there all the time he was working. He was delayed in his work because of them not being there to put the pipe on, his job ended in December right after the first, was there later and saw the damage, Mr. Gilbertson took him to the interior and showed him how much damage was done. It was oil soot, required considerable cleaning all through the upstairs as well as the downstairs, the floors, walls, drapes, clothing and rugs and even the door knobs were covered with it.

These questions were asked and these answers given:

Q. Well, were you there at any time when the boiler exploded?

A. It didn't exactly explode, but it would blow the oil in. As I gathered it from being in and out of there, it blew the oil in, and there was a little electrical device on the front of this nozzle that ignites the oil, and, when the cold oil hits this hot fire brick, it creates a gas; and, if it isn't ignited immediately, why it will eventually cause explosions. Where there is too much of it in the air, it

just blows soot and back fires and explodes, as you call it.

Q. Were you there at any time when the doors of the boiler——

Mr. Bell: I move to strike the answer of the witness, because it is an opinion, and he is not qualified as an engineer or an expert on oil burners or this kind of work.

The Court: Objection overruled.

Mr. Bell: Exception.

And on cross examination, Mr. Wilson testified as follows:

I was mostly working for myself in 1944, that is building my own home until Mr. Gilbertson asked me to come out and remodel his place. I don't do that by contract, I did it time and material. I was employed there you might say as foreman, I was to take [335] care of the men that was there. The pipe that held them up was the one going from the main steam line through the wall into the kitchen. I cut a hole in the place so that I could put the cabinets in. It was sometime in December that Mr. Gilbertson took him upstairs and showed him the soot, they were discussing it. It was after I finished my work. I wouldn't say whether it was before or after the filing of this lawsuit.

On recross examination he testified, he was not interested in the outcome of the lawsuit.

Then Plaintiffs moved as follows:

Mr. Bell: Comes now the plaintiff and moves to strike all of the evidence with relation to the soot

or damage done to the building for two reasons: One, that it is not within the pleadings, and for the next reason that there has been no proof at all, whatsoever, of any warranty of this old second-hand burner that everyone knew was an old, second-hand burner that was put in there for a temporary use, and therefore, it was not guaranteed not to smoke; and it was evidently known that it was defective, or it wouldn't have been installed just for a temporary use until better burners could be obtained. Therefore, I move to strike all of this testimony as to the damage because it would not be binding on these plaintiffs, who didn't warrant this old burner not to smoke.

The Court: Motion denied.

Mr. Bell: Exception.

Then in rebuttal the Plaintiffs called Hillary H. Kling who testified as follows:

That he is a steam fitter, has been for 18 years, has been foreman for various companies during that time, was foreman for Siems Spokane and Drake in Kodiak for a year and a half, worked for Reed and Lane in Fairbanks, set the boiler in the place called The Ranch, is familiar with boilers, he set it to the best of his knowledge with the boiler that they had. There was no defects in the setting that he knows of; the boiler was a [336] used boiler and it would not be set like a new one. The foundation it sets on would be warped from the heat where it was previously used before, but that would not affect the boiler. It was a 26" boiler. It would be amply large to heat the building, it came out of

the Alaska Airlines hangar at the airport. I set the boiler only, worked there for a few days erecting the boiler, helped transfer the boiler from the Reed and Lane Plumbing and Heating shop out to the Lanes with the assistance of the men that were under the employment of Mr. Gilbertson. They took it out there a section or two at a time, made two or three trips back and forth from the shop taking it out there. I cleaned it up and erected it inside the boiler room, cleaned it up and assembled it the way it should be, put headers on it and put pipe on that leading to the entrance of the building itself, the work was in a first-class workmanship manner.

On Cross examination by Mr. Clegg, he testified that he wasn't there after the boiler was fired up, never went back to work at it. Went back one time to get his overalls and jumper he had left there. Don't remember the date that he erected it. That it is the same boiler that is in dispute here that he set. The one he worked on. He worked for Siems-Drake Construction Company over at Kodiak as a steamfitter a year and a half, came from California. Siems Drake Construction work at Kodiak, been in Fairbanks since August 1943 working for himself now, at 111 Noble Street, operates a cafe called the Diner, is the owner of it. Has not abandoned his trade of steamfitting, going back with Lytle and Green as Foreman of Steamfitters when they resume work this spring for the Alaska Railroad, was employed by them last fall, also promised a job then, would have to make some other arrange-

ments to take care of the Diner. Worked out at Alaska Airlines on the boiler for Reed and Lane. He said the boiler came from there and they took it from the Alaska Airlines down to their shop and then transferred it from there out to the Ranch [337] The Court adjourned until ten o'clock a. m., Tuesday, February 5, 1946) at which time Joseph Lane was recalled and testified that he remembers Montgomery out at the place, he was a general handy man and did a little bit of everything. I had a talk with him the day I repaired the burner, he was there when the burner was repaired, that was the 24th day of December, 1944 as the tickets show.

Then the following questions were asked and answers given and the rulings of the Court were had:

Q. Now, in that conversation, what was said by you and what was said by Mr. Montgomery.

Mr. Clegg: We object to that as incompetent, irrelevant, and immaterial and not rebuttal.

The Court: There was no foundation laid for an impeachment either, was there?

Mr. Clegg: No sir.

The Court: Objection sustained.

Mr. Bell: Exception.

Q. Mr. Lane, did you testify in chief as to what you did that day out there. A. Yes.

Q. Now, did you talk to Mr. Montgomery and show him what you did? A. Yes.

Mr. Clegg: We object to that as immaterial and irrelevant and not binding on the defendants.

The Court: Well it has been answered.

Q. Mr. Lane, in that conversation did he tell you that he had taken that electrode out two or three times and worked on it himself?

Mr. Clegg: We object to that, if the Court please, as no foundation has been laid for the question. It isn't rebuttal testimony, and it is not binding on the defendants. [338]

The Court: Objection sustained.

Mr. Bell: Exception. Your Honor, may I make an offer then? I offer to prove by this witness, if he was permitted to testify, that he had a conversation with Mr. Montgomery, who was a regular employee of the defendant in this action, and that in this conversation Mr. Montgomery told him that he had taken this electrode out and worked on it two or three times, and then when Mr. Lane examined it, it was broken—the electrode was broken—and that he repaired it; that he did not have a new electrode to substitute or replace this one, and he repaired it so that it worked good at the time and placed it back, and it worked all right at the time. I offer to prove that.

Mr. Clegg: To which we make the same objection as before.

The Court: Objection sustained, exception allowed Plaintiff.

Q. Mr. Lane, you heard Mr. Gilbertson testify that there was plenty of burners in the Town of Fairbanks at that time. Is that true?

A. Not to my knowledge it isn't.

Q. Well, were you able to get any burners at that time other than what you furnished him.

A. No.

Q. Now did Mr. Gilbertson know that this was an old burner at the time you let him have it?

A. Yes.

Q. What was your conversation with Mr. Gilbertson with reference to taking out the new burner that was in the boiler, under the boiler, and placing in the old burner that was larger?

Mr. Clegg: Just a minute. We object to that as leading and suggestive, incompetent, irrelevant, and immaterial, and not rebuttal.

The Court: Now is that rebuttal, Mr. Bell?

Mr. Bell: Mr. Gilbertson testified to what that conversation was, and this gentleman has a different version of what [339] the conversation was, and that he explained to him at the time that it was old and that he would let him have it, if it could work all right, until they could get another burner, and then, if they could get a new burner as large as Mr. Gilbertson wanted anywhere, they would take it back, allowing him the same \$100.00 for it that they charged him for it.

The Court: Objection sustained.

Mr. Bell: Exception. I offer to prove at this time by this witness, if permitted to testify that when he talked to Gilbertson about taking out the new burner that it was working all right at the time, but Mr. Gilbertson thought it was consuming too much oil because it burned too much of the time to keep the boiler hot and wanted a larger

burner, and that this witness told Mr. Gilbertson at the time that he had an old burner that he could have for \$100.00, and he would take the new burner out and give him credit for the full \$250.00, the amount he had charged him for the new burner, and then if he could, if Mr. Gilbertson could get a larger burner, any better burner, that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the \$100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work.

Mr. Clegg: To which we object, if the court please, upon all the grounds heretofore stated and especially on the ground that it isn't rebuttal testimony, and no foundation has been laid for this question, or series of questions.

The Court: Objection sustained, exception allowed Plaintiff.

He then testified that he lent the people an oil burner space heating to use during the time the work was being done and charged them nothing for it because of the fact that material wasn't available at the time and hard to get so in order to keep him going until we were able to get his heating system in why we lent him this burner. Mr. Gilbertson had his own radiators; Reed [340] and Lane furnished unit heaters was all. They were taken from the depot here directly from the depot out to Gilbertson's Ranch. They were not in the original bill as submitted to Mr. Gilbertson, they were overlooked, they were eventually billed at \$195.00 for the

two heaters that had been left out of the original bill to Mr. Gilbertson.

Then these questions were asked and these answers given and the rulings of the Court as follows:

Q. Mr. Lane, what was the occasion of your going out to the Ranch on the 24th of December, 1944?

Mr. Clegg: We object to that on the ground it is mere repetition. It has already been well covered by Mr. Reed.

The Court: Objection sustained.

Q. May I ask the question this way: Were you called by a member—were you called by Harvey Gilbertson or George Gilbertson to go out there that day?

Mr. Clegg: We object to that on the ground that it has been already answered, and it makes no difference which of the defendants did call the Reed and Lane shop.

The Court: Objection sustained.

Mr. Bell: Exception. You may take the witness.

Mr. Clegg: No questions.

Mr. Bell: We rest.

Mr. Clegg: If your Honor please, at this time we would like the privilege of renewing our motion at the close of the main case of the Plaintiffs for non-suit on the grounds stated at that time, and on the further ground that the testimony of the plaintiffs clearly show that the so-called lien statement, this lien statement in this case, was not filed in due time, and was filed after the expiration of ninety days from the cessation of work and furnishing of

materials as alleged in the complaint, and it is, therefore, void; and there is no basis whatsoever upon which a judgment for the plaintiffs might be given to establish this lien, or alleged lien.

The Court: Motion denied.

That thereafter and on the 21st day of February, 1946, Plaintiffs filed their amended motion for a new trial, which is in words and figures as follows, to-wit:

“In the District Court for the Territory of Alaska,
Fourth Judicial Division.

No. 5288

JOSEPH LANE, HENRY REED and STANLEY
SMITH, partners doing business under the firm
name and style of REED and LANE, plumb-
ers, heaters and sheet metal,

Plaintiffs,

vs.

GEORGE GILBERTSON and HARVEY GIL-
BERTSON, joint owners and partners doing
business as THE RANCH and the First Na-
tional Bank of Fairbanks, Alaska.

Defendants.

AMENDED MOTION FOR A NEW TRIAL

Comes now the plaintiffs in the above-entitled cause, and moves the Court to set aside the judgment, findings and decision rendered herein on the 18th day of February, 1946, and to grant a new trial for the following reasons, which materially affect the rights of these plaintiffs.

1.

That the Court erred in sustaining the defendants objections to competent questions, thereby preventing the introduction of competent evidence.

2.

That the Court erred in sustaining objections to identification and exhibits offered on behalf of the plaintiffs which were competent, material and relevant, and should have been admitted in evidence.

3.

That the Court erred in refusing the numerous offers to prove competent, material and relevant evidence.

4.

That the Court erred in sustaining objections to the offers in evidence of the invoice issued by the plaintiffs, the original of which were delivered to the defendants and the exact carbon copy kept by the plaintiffs as a part of their regular bookkeeping record of the account sued on herein.

5.

That the Court erred in sustaining objections to the introduction in evidence of the original time cards; same being the original and first entry of record of the account sued for herein, and being a part of the bookkeeping system used by the [343] plaintiffs in their place of business at Fairbanks, Alaska, affecting the account sued for herein.

6.

The Court erred in sustaining defendants objections to questions which were competent, material

and relevant, and thereby prevented these plaintiffs from making part of their proof of the allegations in the complaint.

7.

The Court erred in finding that the plaintiffs and defendants entered into an oral agreement whereby plaintiffs agreed to furnish an adequate first-class heating system for defendants' building, known as "The Ranch," for the reason that there were no competent evidence to base such findings on, and was contrary to the great weight of the evidence.

8.

That the Court erred in finding that the plaintiffs did install an alleged heating system in said building; that the same was not adequate to heat the said building and was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of \$195.00.

9.

The Court further erred in finding that defendants detached from said building and premises and refused to keep the same the boiler and oil burner which plaintiffs had installed herein as a part of said heating system and charged defendants tendered said boiler and burner, as personal property, back to plaintiffs, and the same is now their property. That such finding is not based upon sufficient competent evidence and is against the great weight thereof.

10.

The Court further erred in finding that the plaintiff's lien claim in this action, having been filed for record upon the 21st day of March, 1945, was filed more than 90 days after the last work or last material was furnished under said contracts and, [344] therefore, was filed after the time allowed by law for filing such a lien claim.

11.

The Court further erred in finding that upon the 24th day of December, 1944, the plaintiffs made a service call to adjust or repair the oil burner at said Ranch and made a charge of \$3.00 therefor; that the same was not pursuant to the above-mentioned contracts or either of them and formed no part of the performance of either of said contracts, and no lien claim was filed for said \$3.00 charge; that said finding was contrary to the great weight of the evidence and not based upon sufficient competent evidence.

12.

The Court further erred in the conclusions of law, number 1, to-wit: The plaintiffs have no lien upon said Ranch or premises.

13.

That the Court erred in conclusion of law number 2, to-wit: That the defendants have paid in full all sums owing the plaintiffs upon said contracts.

14.

The Court erred in conclusion of law number 3,

to-wit: That said boiler and oil burner which were detached from said heating system are the property of the plaintiffs.

15.

That the Court erred in the conclusion of law number 4, to-wit: That the defendants are entitled to recover their costs and disbursements in this action.

16.

The Court erred in denying the plaintiffs any recovery herein for the reason that there were no competent evidence upon which the Court could base such findings and conclusions of law set forth, and to said findings of facts were against the clear weight of the evidence and against the law controlling in this case.

17.

Plaintiffs therefor move that the Court grant a new trial in the above-entitled cause.

BAILEY E. BELL,

Attorney for Plaintiff."

And the Plaintiffs allege that the Court erred in overruling the above amended motion for a new trial which order overruling said motion for a new trial was made and entered in said cause on the 15th day of March, 1946.

Thereafter and on the 25th day of March, 1946, a Notice of Appeal was duly served on opposing counsel and filed in said cause, which notice of appeal is in words and figures as follows: to-wit:

“In the District Court for the Territory of Alaska,
Fourth Judicial Division.

No. 5288

JOSEPH LANE, HENRY E. REED and STAN-
LEY SMITH, partners doing business under
the firm name and style of REED and LANE,
plumbers, heaters, sheet metal,

Plaintiffs,

vs.

GEORGE GILBERTSON and HARVEY GIL-
BERTSON, joint owners and partners doing
business as THE RANCH and The First Na-
tional Bank of Fairbanks, Alaska,

Defendants.

NOTICE OF APPEAL TO THE NINTH CIR-
CUIT COURT OF APPEALS OF THE
UNITED STATES OF AMERICA

Notice is hereby given that Joseph Lane and
Henry Reed, the sole owners and doing business
under the firm name and style of Reed and Lane,
plumbers, heaters and sheet metal, the Plaintiffs
above named, hereby appeal to the Circuit Court of
Appeals for the Ninth Circuit of the United States
of America, from the final judgment entered in the
above entitled action, and from the order overruling
their motion for a new trial entered in this action
on the 15th day of March, 1946, and as grounds of
appeal allege that the Court erred as follows:

I.

The Court erred in overruling plaintiffs objec-

tions to questions which permitted evidence to be introduced that was incompetent, irrelevant, immaterial and prejudicial.

II.

The Court erred in sustaining objections to plaintiffs questions that were competent, relevant and material, thereby preventing plaintiffs from making proof that was admissible.

III.

The Court erred in refusing plaintiffs [347] offers to prove competent material and relevant matters.

IV.

That the judgment and findings of facts are contrary to the evidence; contrary to the law effecting this case, and against the clear weight of the evidence and the Court erred therein.

V.

The Court erred in overruling the motion for a new trial filed herein.

VI.

Errors of law occurring at the trial on the part of the Court, and excepted to by plaintiffs.

VII.

The Court erred in excluding certain identifications offered in evidence.

BAILEY E. BELL,

Attorney for Plaintiff."

That thereafter and on the 25th day of March, 1946, the Court Clerk filed herein his affidavit of mailing copies of the above notice, which affidavit is set up in full in the transcript and made a part of this Bill of Exceptions by reference as fully as if set out herein.

Thereafter and on the 28th day of March, 1946, a certified copy of the transcript showing proceedings had in open Court was filed in this cause and is set up in the transcript and is hereby made a part of this Bill of Exceptions by reference; thereafter and on the 5th day of April, 1946, the Plaintiffs filed their petition for allowance of appeal which was approved by the Court and the appeal allowed, and shown in the transcript and made a part of this bill of exceptions by reference as fully as if set out herein.

On the 5th day of April, 1946, Plaintiffs filed assignments of errors which are a part of the transcript herein and made a part of this bill of exceptions by reference.

On the 5th day of April, 1946, Citation was [348] issued by the Court and filed in said cause and is set out in full in the transcript and made a part of this Bill of Exceptions by reference. That on the day of, 1946, appeal bond was duly filed and approved by the Court, a copy of which is set up in the transcript.

That rules Numbers 42 and 60 of the rules of the District Court of the Territory of Alaska, Fourth Division are as follows:

RULE 42. EXCEPTIONS IN CIVIL CASES

Whereas the laws of Alaska relative to civil procedure provide:

(a) Section 3639, Compiled Laws of Alaska, 1933: "No exception need be taken or allowed in any decision upon a matter of Law when the same is entered in the journal or made wholly upon matters in writing and on file in the Court."

(b) Section 3637, Compiled Laws of Alaska, 1933: "The verdict of the jury, or any decision, partially or finally determining the rights of the parties, or any of them, or affecting the pleadings, or granting or refusing a continuance, or granting or refusing a new trial, or admitting or rejecting the evidence, provided objection be made of its admission or rejection at the time of its offer, or made upon *ex parte* application or in the absence of a part, are deemed excepted to without the exception being taken or stated or entered in the journal."

It shall not be necessary for counsel to take exceptions in such case but, if they so wish, they may, in making up a bill of exceptions for this case, show that the exception was duly taken.

RULE 60. END OF TERM

(a) The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of Court. The expiration of a term of Court in no way affects the power of this Court to do any act or take any proceedings in any civil or original action which has been pending before it.

(b) Any and all undisposed of matters of any nature, pending in this Court at the termination of any term, shall be continued over to the next term, and the situation respecting the same shall [349] in making up a bill of exceptions for the same, show in no wise be affected by the termination of any term or terms.

That the Judgment of the Court overruling the motion for a new trial is in the words and figures as follows, to-wit: No. 5288. Joseph Lane, et al, Plaintiffs, versus George Gilbertson, et al, Defendants.

This being the time set for the argument on the motion for a new trial in this cause, Cecil H. Clegg, Counsel for defendants being present, and Bailey E. Bell, Counsel for the plaintiffs not being present, and the Court having considered the Plaintiff's motion for a new trial, and being fully advised in the premises, it was ordered that the motion be denied.

HARRY E. PRATT,
District Judge.

Entered in Court Journal No. 33, page 299, dated March 15, 1946.

Plaintiff respectfully contend that the Court erred in the proceedings herein where each objection was stated by the Plaintiffs and each adverse ruling of the Court therein, and prays a reversal of the judgment in the above-entitled cause, and

that a proper judgment be rendered therein based upon the pleadings, evidence and rulings therein.

BAILEY E. BELL,

Attorney for Plaintiff.

(Acknowledgment of Service.)

CERTIFICATE

The within and foregoing Bill of Exceptions, together with the exhibits thereto attached is hereby settled and allowed and is approved and certified as a correct record of the evidence produced at the trial of the case and a correct statement of such proceedings, pleadings, ruling and exceptions in said cause during the trial and both prior and subsequent thereto as are deemed necessary by the respective parties to present clearly the matters for review as to which exceptions are reserved, and as are not included in the primary record herein.

It Is Further Certified, that such bill was settled and allowed during the judgment-term or proper extensions thereof, and within the time allowed by the Court, for the settlement thereof.

Given under my hand this 20th day of June, 1946.

HARRY E. PRATT,

District Judge.

[Endorsed]: Filed April 15, 1946.

[Endorsed]: Filed June 20, 1946.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby stipulated and agreed between the above-named plaintiffs and the defendants, George Gilbertson and Harvey Gilbertson, through their attorneys of record, that the time within which said defendants may file herein their objections and proposed amendments to plaintiffs' proposed Bill of Exceptions may be extended to and including May 24, 1946.

Dated at Fairbanks, Alaska, this 7th day of May, 1946.

WARREN A. TAYLOR,
Of Attorneys for Plaintiffs.

CECIL H. CLEGG,
Attorney for Defendants,
Gilbertson.

[Endorsed]: Filed May 7, 1946. [352]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET CAUSE

It Is Hereby ordered, that the time within which the record on appeal in this case shall be deposited and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth District at San Francisco, California, and said cause docketed

therein, be and it is hereby enlarged to the 20th day of July, 1946.

Dated at Fairbanks, Alaska, this 24th day of June, 1946.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal No. 34, Page 78, June 25, 1946.

[Endorsed]: Filed June 25, 1946. [353].

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 353 pages, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 5288, entitled: Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters, and sheet metal, Plaintiffs, versus, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and the First National Bank of Fairbanks, Alaska, Defendants, and was made pursuant to and in accordance with the Praeceptum of the Plaintiffs and Appellants, filed in this action, and by virtue of the said Appeal and Citation issued in said cause, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof, consisting of pages "a" and "b", is a correct index of said Transcript of Record, and that the list of attorneys, as shown on page "c", is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to \$42.85 has been paid to me by counsel for the appellants in this action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 10th day of July, 1946.

(Seal)

JOHN B. HALL,
Clerk.

[Endorsed]: No. 11384. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, Appellants, vs. George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, and the First National Bank of Fairbanks, Alaska, Appellees. Transcript of Record. Upon Appeal from the District Court, Territory of Alaska, Fourth Division.

Filed July 13, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11384

JOSEPH LANE, et al.,

Appellants,

vs.

GEORGE GILBERTSON, et al.,

Appellees.

ORDER THAT EXHIBITS NEED NOT BE
PRINTED IN TRANSCRIPT OF RECORD

Good cause therefor appearing, It Is Ordered that the exhibits included within the certified typewritten transcript of record in above cause need not be printed, but will be considered by the Court in their original form.

It Is Further Ordered that the originals of such exhibits, retained by the clerk of the District Court, are to be forwarded to the clerk of this Court for filing and for use upon the appeal, to be returned by the clerk of this Court to the District Court upon conclusion of the appeal.

/s/ FRANCIS A. GARRECHT,
Senior United States Circuit Judge.

Dated: San Francisco, California, August 5, 1946.

[Endorsed]: Filed Aug. 6, 1946, Paul P. O'Brien,
Clerk.

No. 11,384

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of Reed and Lane, Plumbers, Heaters and Sheet Metal,

Appellants,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as The Ranch, and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA,

Appellees.

Appeal from the District Court for the Territory
of Alaska, Fourth Division.

BRIEF FOR APPELLANTS.

BAILEY E. BELL,

WARREN A. TAYLOR,

Fairbanks, Alaska,

Attorneys for Appellants.

NOV 2 - 1911

Subject Index

Page

Jurisdiction and Statutes Involved.....	1
Statement of Case.....	8
Argument and Citations.....	91

Table of Authorities Cited

Cases	Pages
Aetna Life Ins. Co. v. Kepler, 116 Fed. (2d) 1.....	141
Chatz v. Armour Plant Employees' Credit Union, 154 Fed. 236	144
Clayton Coal Co. v. King et al., 113 Pac. (2d) 672.....	112
G. S. Wood Mercantile Co. Reinc. v. Dougall, 114 Pac. (2d) 202	112
Harper v. United States, 143 Fed. (2d) 795.....	107
Hoffman v. Palmer et al., 129 Fed. (2d) 976.....	107
J. S. Tyree, Chemist Inc. v. Thymo Borne Laboratory, 151 Fed. 621	144
Long v. Shirley, 14 S. E. (2d) 375.....	93
Pacific Mutual Life Ins. Co. of Cal. v. O'Neil, 130 Pac. 270	112
Rowland v. City of Tyler, 5 S. W. (2d) 756.....	93
School District No. 1, Apache County v. Whiting, 107 Pac. (2d) 1075	112
State Farm Mut. Automobile Ins. Co. v. Bonacci, et al., 111 Fed. (2d) 412.....	143
Ulm v. Moore-McCormack Lines, Inc., 115 Fed. (2d) 492...	108

Rules

Federal Rules of Civil Procedure (28 U.S.C.A. following Section 723c) :	
Rule 52	144
Rule 52(a)	140, 141

TABLE OF AUTHORITIES CITED**iii****Statutes****Page****Compiled Laws of Alaska, 1933:**

Sections 1982, 1987, 1989, 1994, 2081 and 2093.....	2
Section 2093	94
Sections 3897-3898	92

28 U.S.C.A., Par. 695.....	106
28 U.S.C.A., page 1078.....	106

Texts

Cumulative Annual Pocket Pact 1945.....	106
Jones on Evidence, Vol. 2, at page 1083.....	106
Nichols Applied Evidence, Vol. 1, page 799, par. 42.....	112

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No. 11,384

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of Reed and Lane, Plumbers, Heaters and Sheet Metal,

Appellants,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as The Ranch, and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA,

Appellees.

Appeal from the District Court for the Territory
of Alaska, Fourth Division.

BRIEF FOR APPELLANTS.

JURISDICTION AND STATUTES INVOLVED.

This action was instituted by complaint filed in the United States District Court for the Fourth Division for the Territory of Alaska, and was based upon the

statutes and laws of the Territory of Alaska generally and more particularly Sections 1982, 1987, 1989, 1994, 2081, and 2093 of the Compiled Laws of Alaska, 1933, as amended by the Session Laws of 1935, page 97. The relevant parts of said statutes are as follows, to-wit:

“Sec. 1982. Who entitled to lien on structures, etc., machinery and lands. Every mechanic, artisan, machinist, contractor, lumber merchant, laborer, teamster, drayman, and other person performing labor upon or furnishing material of any kind to be used in the construction, alteration or repair, either in whole or in part, of any building, wharf, bridge, flume, fence, machinery or aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement or his agent.”

“Sec. 1987. Lien claim to be filed when. It shall be the duty of every original contractor, within ninety days after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person save the original contractor, claiming the benefit of this article, within sixty days after the completion of the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with

the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts."

(This section amended in 1935, giving ninety days to mechanics, artisans, laborers, etc.)

"Sec. 1989. Foreclosure within six months; exception. No lien provided for in this article shall bind any building, structure, or other improvement for a longer period than six months after the same shall have been filed, unless suit be brought before the proper court within that time to enforce the same, or, if a credit be given, then six months after the expiration of such credit; but no lien shall be continued in force for a longer time than one year from the time the work is completed by any agreement to give credit."

"Sec. 1994. Foreclosure. Actions to enforce the liens created by this article shall be brought before the District Court, and the pleadings, process, practice, and other proceedings shall be the same as in other cases. * * *.

In all actions under this article the District Court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees. All actions to enforce any lien created by this article shall have preference upon the calendar of civil

actions brought before the District Court and shall be tried without unnecessary delay.

In all actions to enforce any lien created by this article all persons personally liable and all lien holders whose claims have been filed for record under the provisions of section 1987 shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may, be made parties; but such as are not made parties shall not be bound by such proceedings. The proceedings upon the foreclosure of the liens created by this article shall be, as nearly as possible, made to conform to the proceedings of a foreclosure of a mortgage lien upon real property."

"Sec. 2081. Employment deemed continuous; when. The fact that any lien claimant may have been employed at different kinds of labor or at different rates of wages during the period of his general employment, shall not be deemed an interruption of the continuity of his employment; and no temporary cessation of employment of the lien claimant under an understanding of resumption thereof within a reasonable time, shall be considered an interruption of the continuity of employment so as to cause the time to run within which the notice of the lien is required to be filed. (57-113-33)."

"Sec. 2093. Provisions of chapter to be liberally construed. The intent of this chapter is hereby declared to be remedial and its provisions shall be liberally construed. (69-113-33)."

To the plaintiffs' original complaint (Tr. p. 2) the defendants, George Gilbertson and Harvey Gilbertson, filed a demurrer, which was sustained by the Court, who gave as his reason for sustaining the demurrer that in paragraph 5 thereof, the allegation that the plaintiffs supplied work and material as aforesaid, of the value of \$2107.24, was not sufficient, and stated that the words "reasonable and customary value" being omitted, made the complaint demurrable; and, also in paragraph 7, in the last three lines thereof, the complaint alleged that the defendants accepted said job as finished and promised to pay therefor, but have failed, neglected and now refuse to pay. The trial Court stated that it was demurrable because the complaint did not have these words therein, "the sum herein sued for." Then, in addition thereto, paragraph 9 in the original complaint alleged: "claim a lien upon said property by recording in the office of the recording district wherein said property is situate and said work performed and material furnished, to-wit: The Fairbanks Recording District." The complaint, however, contained an exact copy of the lien notice, showing that it was filed in the United States of America, Territory of Alaska, Fourth Division, Fairbanks Precinct. (Tr. p. 9.) The trial Court held that the complaint was demurrable because in paragraph 9 there was not a repetition of the words "Territory of Alaska."

Plaintiffs then filed an amended complaint and the defendants above named again demurred and the de-

murrer was sustained by the Court because the complaint did not contain the following:

“All of said property being situated on the Richardson Highway near the Town of Fairbanks, Alaska, in the Fourth Judicial Division in the Territory of Alaska.”

Then plaintiffs obtained permission from the Court to amend the amended complaint at the bottom of page 2, by adding the words “in the Territory of Alaska.” After this was done, the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, filed their answer herein admitting that they employed plaintiffs to do certain plumbing, steam fitting and sheet metal work, and to furnish certain materials, including efficient heating plant to be used in the buildings and improvements situated upon the real property described in said amended complaint, for the reasonable price and value customarily paid in the town of Fairbanks, Alaska, and alleged, “and did not furnish all the materials necessary therefor.” (Which was nothing more than a negative pregnant, and an ambiguous allegation which amounted to nothing.)

In paragraph 2 of the answer (Tr. p. 22) the defendants admitted that the last item of work and materials supplied by plaintiffs was so supplied on the 23rd day of December, 1944. However, after plaintiffs' evidence was in and they had rested, the Court permitted the defendant to amend by stating: “It may be amended to conform to the evidence.” (See transcript of clerk filed herein at page 51.)

Now, in the certified transcript the date of 23rd has been scratched out by pen and the 16th inserted. (See paragraph 2 of the answer shown in the clerk's transcript filed herein.) But the answer as filed in the case by the defendants specifically alleges in paragraph 2, the following:

“Answering paragraph 5, these defendants admit that the last item of work and materials supplied by plaintiffs was so supplied on the *23rd day of December, 1944*, and defendants deny all other allegations and each thereof contained in said paragraph 5, except the allegation that defendants were and are entitled to a credit from the plaintiffs in the sum of \$677.46.”

Then in paragraph 4, the defendants denied that the work and labor done and materials furnished by plaintiffs to the defendant were done and furnished in compliance with ANY oral contract between plaintiffs and defendants. (See answer, p. 23 of printed transcript.) And then contradict this denial in the same paragraph by alleging that the said contract contemplated a good, sound, first class job on the part of plaintiffs, and plaintiffs wholly failed to perform their contract in this regard, as heretofore alleged in paragraph 1 hereof. However, paragraph 1 makes no statement charging that the plaintiffs agreed to do a good, sound, first class job. To this answer a reply was filed. (Tr. p. 25.)

STATEMENT OF CASE.

In 1944, the town of Fairbanks was crowded with soldiers, contractors and their employees, and the defendants, George Gilbertson and Harvey Gilbertson, were building a road-house just outside of the city limits of Fairbanks, fall was coming on and due to the inclemency of the weather in this part of the world, it was imperative that some kind of heat be furnished, or they could not expect customers. The Walker Construction Company was engaged in building The Ranch buildings, and Mr. Lane, one of the plaintiffs herein, was taken out to The Ranch by Mr. Walker, and the defendant, George Gilbertson, informed Mr. Lane that he had been in his lifetime an experienced steamfitter and told Mr. Lane what he wanted done there. The two men discussed the extreme shortage of building material and especially heating equipment, discussed the basement which was then full of water, and it was agreed that the defendants would get the water out of the basement and dry it up so that a heating plant could be installed therein. With this in mind, Joseph Lane, a licensed and experienced steamfitter, recommended a hot water system in preference to a steam plant. This was agreed upon, providing some equipment could be found. However, the defendants could not, or did not dry the basement and later a lean-to was built at the side of the main building and then it became necessary to put in a steam plant instead of the hot water system recommended by Mr. Lane. A second-hand boiler was discussed, and was the only thing available

in Fairbanks at that time that could be found as a temporary heating plant for The Ranch. The defendant, George Gilbertson, asked the plaintiff, Joseph Lane, about what the charges would be, and this was all agreed upon between them, as to so much per hour for the men working, and \$175.00 for the old boiler. There never was, according to the testimony, any agreement that the plaintiffs would put in a first class heating plant because both of the parties knew that was impossible and that the material for installing a first class heating plant could not be obtained at any price, but it was agreed that the plaintiffs would furnish the labor and the old second-hand boiler and do some plumbing and sheet metal work at the regular and customary prices charged by them at Fairbanks at this particular time.

Joseph Lane was called as a witness and testified that he was a member of the partnership of Reed and Lane, that he was taken out to Mr. Gilbertson's place by Mr. Walker, that George Gilbertson was at the time at The Ranch in the barroom, that was some time in August of 1944, that he had a conversation with George Gilbertson, that Gilbertson wanted a steam system put in, was going to put a boiler down in the basement, but his basement was flooded, that he advised him to put in a hot water job because it was more economical to operate, but nothing could be done until the basement was dried out. That Mr. Gilbertson laid out the fact that he wanted unit heaters there in the barroom and dance hall, said he would like to have Mr. Lane do the job when the basement

was dry. That he had a later conversation with him concerning the building of a lean-to on the outside to put the boiler in. They talked it over and could not get a hot water job in at that time and decided to go ahead and put in the steam job. That it wasn't practical to put in a hot water job that way. That Mr. Gilbertson sent his man over to haul the boiler sections to the lean-to. There was nothing said about supervision at that time. Later on Mr. Gilbertson had received the bill from Walker with quite a bit of supervision on it, and he told Mr. Lane he did not want any supervision on that job and told Mr. Lane that he had been a steamfitter. Mr. Lane further testified that all the work he did was help set up the boiler, that the rest of the work was done by employees furnished by the plaintiffs, and that George Gilbertson told them what to do and said he did not want supervision and supervision was cut off. That Mr. Lane furnished the men and what material Mr. Gilbertson came in and got or one of his men was sent after. (Tr. pp. 88, 89 and 90.) He then testified that he had a conversation with Mr. Gilbertson about the bill. There were some errors in the bill, that he and Mr. Gilbertson went over it, we went over all the material out there and changed the bill and thought that he and Mr. Gilbertson had reached an agreement, at least when they left each other everything was in good shape, so it looked like he was satisfied and so were we. (Tr. p. 90.) Then Mr. Lane further testified that they had the tickets out there, that these tickets were all gone over, he then identified all of the tickets

that he and Mr. Gilbertson had gone over, stated they were in the same condition that they were at that time, and that they are part of the regular records kept or the bookkeeping system at their place and a part of the timekeeping system made out each night, the original and first entries made. These tickets were then marked as Plaintiffs' Identification No. 1, by the clerk of the Court. He further testified that several changes were made in the tickets by them at that time and concessions were made to Mr. Gilbertson, and then went ahead and explained those concessions. That the bill as corrected and agreed upon that time by him and George Gilbertson amounted to \$1429.76. Then these tickets as above identified were offered in evidence, and then a long objection was stated by Mr. Clegg, which was not a proper or legal objection at all. (Tr. p. 92.) However, the Court sustained this objection and denied the admission of the tickets.

Then Mr. Lane later testified that he sent a corrected statement which reflected the true condition agreed upon, by him and Mr. Gilbertson to the defendants. That this statement was based upon the corrected bills, time cards and invoices and adjustments allowed. He then identified the time cards, stated they were before Mr. Gilbertson and himself at the time the adjustments were made. Then Exhibit A was re-offered in evidence and Mr. Clegg objected by these words: "We make the same objection as heretofore, without repeating it." (Tr. p. 94.) The Court sustained the objection again and an exception was allowed.

Then Mr. Lane identified a statement that had been marked Identification No. 2, testified it was an exact copy of the statement referred to by Mr. Clegg as being given to the defendants. Then the amended statement was offered in evidence. (Tr. pp. 94 and 95.) Defendants objected on the grounds that no contract or agreement had been established as alleged in the complaint and this therefore is incompetent, irrelevant and immaterial, there is no testimony here showing there was any agreement reached as to what the terms of this alleged contract were or what was supposed to be done by the plaintiff in performance of the contract or what the terms of the contract were. This objection was sustained by the Court, exception allowed plaintiffs.

Mr. Lane then testified that it was a cost plus job, in other words, a time and material job because they were just hired to put in the work. "I told him at the time it was \$3.00 an hour and he wanted me to go ahead with it, in fact, they sent down three men and insisted on getting the boiler in there." At that time we were very busy, we didn't get at it immediately when he wanted it, that was one of the reasons he sent his own men down after the boiler to haul it up there. We did the work in compliance with his request. That the itemized statements (Plaintiffs' Identification No. 2), show each item furnished and charged for, and all of the labor furnished and charged for. It shows the invoice capitulation. That was presented to him by Mr. Reed. After he (Mr. Lane) worked this out with Mr. Gilbertson he didn't talk

to him any more, that Mr. Reed talked to him after that. Mr. Lane was then asked:

“Q. I see. Mr. Lane, was the items of labor and material that you have testified about here, were they all charged at the customary and regular price for labor of that kind in Fairbanks at that time?” (Tr. p. 96.)

This was objected to and the Court sustained the objection and an exception was taken. He then testified that he knew of his own personal knowledge that the material listed in the identification above referred to was actually used and went into the building involved here. That he and George Gilbertson went over the list piece by piece, went over the entire building and went over the hours of labor in the conference, made a few corrections therein, that Gilbertson kept a labor record and that plaintiffs' labor record did not exactly tally, that he made up the statement that was marked “This statement supersedes all other statements” and that the statement is exactly correct as agreed upon between the witness and Mr. Gilbertson. Plaintiffs' Identification No. 2 being the statement referred to, was then introduced in evidence and found in the certified transcript of the record filed herein at pages 242 and 243, and is set out in full on pages 98 and 99 of the printed transcript. And that the statement showed all the changes and credits claimed as well as the balance due thereon.

On cross-examination he testified that he helped do the work, there were four working there setting up the base and setting up the boiler. It would probably

take about two days or sixteen hours for four men, it would be four times sixteen that it would take in the way of hours, that he thinks that is about what it took to put it up. That the billing shows labor of mechanic $65\frac{1}{2}$ hours, labor for helper $9\frac{1}{2}$ hours, but that the header is quite an item on there, it is a four-inch pipe that has to join from one end of the boiler to the other, and then the main hooks into the top of it and runs across the side of the lean-to and around the corner in there and in bricking up the boiler on the inside as well, that's all included in that item there. (Tr. p. 100.) That the job was straight time and material, that when a party comes to us and wants us to do work for them and don't want us to state a set contract price, but just wants us to furnish time, labor and materials, that's a time and material job. In other words, we charge them for the time and material, there is no ten per cent plus charged. That the charge shown on the statement is a proper charge, that the men spent that much time, that Mr. Gilbertson sent his own men after lots of the material, that Mr. Reed is the plumber, that he had nothing to do with the boiler, that's as Mr. Gilbertson and I agreed upon it. The agreement was about the corrections made in the bill. (Tr. pp. 101 and 102.) The labor was correct and as per agreement. That the statement contained the words "as per agreement" and the meaning of those words was that an agreement was made between Mr. Gilbertson and Mr. Lane, including the corrections. That he agreed to put in a steam heating system, that he put it in, that he never

put in any other system there, so far as he knows it is still there, that he has never gotten paid for it. I understood that he was going to take it out and put the boiler in the basement at some future date when I put that one in there, whether he did or not, I don't know. That he first started working in October, he quit when the job was completed late in December, somewhere around Christmas time. He had a man there doing the work, that his name was Kling, who set the boiler up and run the header and mains and Mr. Wilcox finished up the job.

They used the boiler after we got some heaters hooked to it so it could be used, he saw it in operation many times, possibly a half dozen times. He was out there taking away some material along in January, couldn't give the exact date. We changed an oil burner while we were still working on it. This was done at Mr. Gilbertson's request. We got the boiler originally from the Alaska Airlines, it had been in use a good many years, it was an iron sectional boiler, that he took it in on a trade, that he tested it for capacity to heat a building of that kind. It was more than sufficient size. It is figured in the number of square feet of radiation it will handle and that boiler is capable of handling in the neighborhood of 1200 square feet. It is a low pressure, cast iron sectional boiler, is rated in the number of square feet of radiation it will handle, it was sufficient to handle two buildings like The Ranch. It was satisfactory so far as size was concerned, it was satisfactory when I left there.

There were two burners put in out there, the first one put in was a new burner, it was bought in Seattle from LaPere and Walker, we bought 4 or 5 of them, all we were able to get. Oil burners were hard to get at the time, and that was one of the four we got. We installed it. This burner was in there possibly three weeks, Mr. Gilbertson said it was too small. However, it was doing the work at the time, but he decided it ran a good time without shutting off and was too small and he wanted it out of there. Mr. Gilbertson and I made an agreement on an old burner. I told him at the time that the burner was an old one and that it was the only burner that was available in town. If he wanted the burner changed and if he wanted this old one that was in poor shape, I would put it in and at such time as he or I could get ahold of another burner I would allow him the price of that burner back and that was satisfactory. The \$100.00 with return guarantee and when we put in another burner he was to return that burner and get \$100.00 back. Mr. Gilbertson and I talked it over and he told me to put it in. I told him the old burner was the only one in town available. I told him it was an old burner at that time, I put it in at his instruction. He was the one who wanted it because he said the other was too small. (Tr. pp. 110 and 111.)

He was the man who was directing all this business, Mr. Gilbertson instructed me that, after he had trouble with Walker, and Walker's bill had a lot of supervision in it, if he told me once, he told me a dozen times he didn't want any supervision on that

job. Therefore he let Mr. Gilbertson do just as he pleased. That Lane assumed no responsibility after the boiler was set up, because from then on Gilbertson instructed him that he wanted no supervision.

Then Henry Reed was called and testified, that he was a member of the partnership of Reed and Lane, had been since its inception, he did some of the plumbing at The Ranch. The rest was done by his employees, he did all of it except 5 hours. He charged for the work at the regular and customary charges at Fairbanks, Alaska, at that time. He furnished some of the material and fixtures at the customary and regular charge being charged at Fairbanks, Alaska, at that time. That after the job was finished he had a conversation with George Gilbertson.

These questions were asked and the answers given as follows:

Q. There is a credit of \$250.00 on here for returned material. What was that for?

A. Well, originally, that was for the purchase of a bathroom set, a complete bathroom set with pre-war fixtures. We purchased the material from the Graehl Circle Bar for \$250.00, and we quoted the price to George, and he was tickled to death to get it, and he paid for it at that time. He (287) was contemplating putting in the plumbing in a house adjoining the Ranch.

Q. Now, did he ever take those bathroom fixtures?

A. No, sir, he didn't.

Q. And is that what that credit of \$250.00 is for?

A. That's right.

Q. Now, was the plumbing work that you did there all right? Was it finished when you got done with it, the part you did?

A. Yes.

Q. And are the charges you made there correct?

A. That's right.

Q. Now, have you ever talked to him about this bill that supersedes all previous bills? Are you using it, Judge?

A. I have a copy, sir.

Q. We have a copy. You may keep that. Did you ever go over that bill with George Gilbertson yourself?

A. Yes.

Q. And at what time did you go over it with him?

A. I believe that that was in January, sir. No, I take that back. I think it was after February.

Q. After February. And what was your purpose in going over it with him?

A. There was a lot of errors and mistakes. If I might go back a little bit——

Q. Yes, go back.

A. During the war—at the time, when the war was in progress, bookkeepers were at a premium. The government had taken all clerical help to speak of, and we had a man working for us by the name of Walt Calhoun, and Walt was not a full-fledged bookkeeper. He never professed to be, but he did the best he could, and Walt had taken care of the books to the best of his ability. However, there was mistakes, which anybody is liable to make. These mistakes were

taken up with Mr. Gilbertson by Mr. Lane, and the time cards and everything were gone over, and I went out to see George and Harvey about collecting the account, and at that time we went over it. (288)

Q. Was there any—was there something in there, any plumbing work in there, that he ever kicked about at all, or the charges for the plumbing, at that time?

A. I don't recall that George ever did complain about the plumbing.

Q. He didn't to you, anyway?

A. He didn't to me at all, no.

He then testified that he employed a lawyer and filed a notice of contractor's lien, the lien was then identified and introduced without objections which is shown on pages 144, 145, 146 and 147 of the transcript and made a part of this bill of exceptions by references; that he had been paid nothing since the filing of the lien; that the amount set forth in the lien was the correct amount of the indebtedness from George Gilbertson and Harvey Gilbertson, doing business as The Ranch, to himself and partner after all proper credits were given.

On cross-examination he testified that Calhoun was the bookkeeper, he didn't profess to be a full-fledged bookkeeper.

Then these questions were asked and these answers given, as follows:

Q. What difference was there in the bills that you furnished to Gilbertsons for this work and the revised bill that you say supersedes all others?

A. There is about \$400.00, sir.

Q. Do you mean you increased the amount that you claimed to be due \$400.00, or reduced it?

A. We reduced it, sir.

Q. Isn't it true it is greater than the original bill you sent him?

A. No, it isn't.

Q. Did you ever examine the original statement?

A. Yes, I have examined it.

Q. And checked it?

A. Yes, sir.

Q. I see this statement of account here, which commences November 8 and finishes December 15, is that the one you checked?

A. This is the first bill that was presented, all of our first invoices, sir. This is the first statement that they (289) received.

Q. That you sent?

A. Yes. They were sent all of our first invoices.

Q. You said something in your testimony already about checking this first statement, or checking any statement. Is this the one that you checked?

A. That is the statement that George Gilbertson and Mr. Lane checked.

Q. There is a notation there once or twice, maybe oftener, "checked Geo." Do you know whether that notation on that first bill was put on there by your firm or Gilbertson's firm?

A. It wasn't put on by our firm, sir.

Q. Would you say it was a correct statement?

A. No. No, sir, I wouldn't. That is where the errors were, in that first bill.

Q. Well, do you know, of your own knowledge, when you commenced to work on this project for the Gilbertsons? What date was it, if you know?

A. The only way I have is of checking back, sir. I could check back on the time cards.

Q. Sir?

A. The only way I could tell you would be from my time cards. I could tell you in a minute. It is too long ago to remember the exact date.

Q. Do you know when you quit?

A. We had a small job out there, and it wasn't carried on in consecutive days, so far as my work was done.

Q. Now, I call your special attention to the original bill that you say was tendered and contained errors to the fact that it shows that the last entry apparently made by you against Gilbertson is dated December 15th. Do you know whether that is true or false?

A. No. There was work performed after the 15th.

Q. There was. What was the character of it?

A. I think that was a matter of some——

Q. Sir?

A. I think that was a matter of a range hood.

Q. Range hood?

A. In the kitchen upstairs.

Q. The bill shows there was a range hood, doesn't it? (290)

A. That is true, sir. That was the order for the range hood that was made out on that invoice. The work was never completed until late in December.

Q. Here is an invoice for the installation of the range hood, and it gives the date it was finished. It started 11/3 and finishes 12/13.

A. Which bill are you looking at, sir?

Q. I am looking at this one that says, "Installation of range hood," dated January 8, 1945. It is attached to this general bunch of statements here.

The Witness. May I ask a question, your Honor?

The Court. Surely.

The Witness. Were these time cards entered as an exhibit or not?

The Court. They were marked as an identification. You may refer to them.

A. In refreshing my recollection, I would like to correct my statement about the range hood. It wasn't a range hood. It was making floor flanges for the dance hall, rails in the dance hall.

Q. Rails?

A. Yes, sir.

Q. Where does that show on this original bill?

A. They don't have all of them there.

Q. They don't have all of them?

A. No, sir.

Q. Well, what is overlooked?

A. Do you have an invoice 350, number 350?

Q. Wait a minute. There don't seem to be any numbers on here.

A. On the top, sir, in the left-hand corner.

Q. Yes, I got 350.

A. Do you have one for railing?

Q. Railing, did you say?

A. Yes. It would be for railing; it only shows material, but that is what it was made up for.

Q. Will you look there and see if you find it on there? There is 350, isn't it?

A. Yes. Right here, sir—this material here. However, the date of the time card is later than that. (291)

Q. What did you furnish—what I am trying to get at is what did you furnish or do after the date of December 15th or 16th?

A. It is right there.

Q. It doesn't show that.

A. It does, sir. It shows labor, and it shows also material.

Q. But you were talking about railing.

A. This material was made up into a rail, and that is where the labor was entailed in it.

Q. Anyway, it was all concluded on December 15th, presumably, from this bill.

A. That is right, presumably from that bill, but the time cards were later than that. The work was done later than that.

Q. Do you have the time card?

A. There is one right there on the 20th.

Q. Was there anything after the 20th?

A. I think there is work on the burner after the 20th. There is one on the 24th.

Q. "Service call on burner labor, one hour." You mean they called up and said there was something wrong with the burner?

A. Yes, sir.

Q. You sent a man out there and fixed it, and that is charged up as a part of this contract?

A. That is part of the bills, sir.

Q. Well, do you know anything about what arrangement was made between your firm and Gilbertsons, the defendants, with reference to this contract?

A. We never had a contract, only a verbal agreement with them.

Q. Just a verbal agreement. Didn't you have a cost-plus contract, or some kind of a contract?

A. I don't recall ever having that. They just wanted us to do the work. Under ordinary circumstances, we do that work under time and material.

Q. Didn't you say at one time it was a cost-plus contract?

A. No, sir. We don't operate on a cost-plus basis.
(292)

Q. You don't operate on a cost-plus basis?

A. No, sir.

Q. Whatever contract you had with the Gilbertsons in connection with the installation of this heating plant on the Ranch, did it naturally follow that you could charge up to it this call on December 24th as part of the contract?

A. Oh, yes, sir.

Q. You are certain about that?

A. Yes. Any time you get an order through your office, through our office over there, we make a service charge from the shop, which is allowable to us and that is charged from the time we leave the shop until we get back.

Q. Well, would you call it part of the original contract that was entered into to install that plant?

A. We never had a contract. All we had was a time and material job.

Q. Time and material job. So anything that shows up here in the papers, on the pleadings here, that you did have a contract is the bunk?

A. Well, if there is a written contract on it, I never saw it.

Q. You don't mean a written contract necessarily, do you? Any kind of an oral contract would be just as good as a written contract, wouldn't it?

A. We never had an oral contract so far as a set price is concerned. We did have an agreement with the man to do it on a time and material basis. That is an oral agreement.

Q. Wouldn't you call that a contract?

Mr. Bell. I object to that as argumentative.

The Court. I think he is entitled to find out what the witness means by a contract as claimed by his testimony.

A. I would say it is what we could call an order.

Q. An order?

A. An order placed with us to do a certain amount of work, there was not being any question asked as to what the cost will be. To define it, our shop operates

—the way we do business over there, if we have a contract, we specify what we (293) will furnish; ordinarily the amount of time it will take for a certain amount of money to be paid a certain way. If we don't have that written agreement, we have an oral agreement that the cost will not exceed so much. If we don't have that, our work is all charged out on a time and material basis, and I don't really believe it constitutes a contract so far as the plumbing shop is concerned, because he could have stopped or terminated that contract any time he saw fit. It doesn't hinder him from doing as much work as he wants to do on it. Therefore, the responsibility as to the workmanship is ours, but the amount of work is his.

Q. Well, you are prepared to say, now, that you didn't have any contract?

Mr. Bell. I object to that. It is argumentative. He has explained exactly how he was employed, and that is for the court to determine. That is a legal question.

The Court. The objection will be overruled.

Mr. Bell. Exception.

Q. Is that your contention?

A. What was the question again, sir?

Q. I said, your contention is—I don't know exactly what the question was, but I will just revamp it and reframe it. Your contention is that you didn't have any contract. Is that right or wrong?

A. I would say that we had an order, what we could classify as an order, from the Gilbertson brothers to do a certain amount of work. There was no written contract, no.

Q. I call your attention to paragraph four of the amended complaint in this case, which apparently you signed on the 9th day of May, 1945, as follows: "Plaintiffs—that is you—further alleges that on or about the 7th day of November, 1944, the defendants George Gilbertson and Harvey Gilbertson, joint owners and partners doing business at the Ranch, employed these plaintiffs to do certain plumbing, steam fitting and sheet metal work and to furnish certain materials to be used in the buildings and improvements situated upon the hereinafter described premises and property which improvements were then being constructed, remodeled and repaired (294), and the defendants George Gilbertson and Harvey Gilbertson orally agreed to pay therefor, the customary and reasonable price for the material furnished and the labor furnished and performed. At the special instance and request of the two last named defendants, the plaintiffs did and furnished certain work and labor and certain material in the installation and finishing of the improvements and building on said property and that continuously from the commencement of said work and week by week and month by month, these plaintiffs expended and furnished labor, skill and material which were incorporated in the buildings, improvements, and structures on the above-described real estate; that all of said labor, skill, and materials were incorporated in said structures." Do you want to see this before you answer the question? I am reading you what was set forth here in the amended complaint, signed by you on the date I mentioned. Would you like to see it?

A. No, that is all right, if you read it.

Q. I just did.

A. That is right, sir.

Q. With some labor on my part. Now having your memory refreshed by the reading of this statement in the complaint, it is your statement now that there is, or was not, any contract between you and the defendants with reference to this work?

Mr. Bell. I object to that as having been asked and answered.

The Court. Objection sustained.

Mr. Clegg. That is all, Mr. Reed.

Mr. Bell. That is all.

The Court then recessed and after lunch Mr. Reed was recalled and testified that "When we talked about the bill there was no objection made to the plumbing at that time and he said 'We will skip that, because it is all right. There are only a few hours on it.' " And on recross examination the following questions were asked by Mr. Clegg, and answered by the witness. (295)

Q. What plumbing are you referring to?

A. The plumbing we did at the Ranch.

Q. All the plumbing?

A. Yes.

Q. Including this railing you said you put around the floor, or segregated the dancing space from some other part of the building? Is that plumbing work?

A. Well, it could either be done by a pipe fitter, steamfitter, or plumber—anybody familiar with stock and dies could do that work.

Warren A. Taylor was then called as a witness and testified that he was a regular licensed lawyer for the Territory of Alaska, practicing at the bar. Was familiar with the reasonable and customary charges for attorneys in handling cases before this Court and fixed as a reasonable fee, as ten to fifteen percent or \$100.00 plus ten percent of the amount involved.

Then George Gilbertson was called to testify on behalf of the plaintiff and testified as to the ownership of the property involved which is set forth at 46, 47, and 48 of the transcript of testimony and proceedings prepared by the Court reporter and filed herein and made a part of the Court clerk's certified transcript. Then the plaintiff rested and the following proceedings took place:

Mr. Clegg. If the Court please, at this time, on behalf of the defendants and each of them, we move for a nonsuit, this action being what is ordinarily called an action for the foreclosure of a lien and is based entirely upon the lien that has been introduced in evidence and testified to by certain witnesses and which has been received in evidence. We ask for (296) the nonsuit upon the ground of failure of proof, it having been alleged in the complaint that the last work and/or materials furnished by the plaintiffs was furnished on the 24th day of December, 1944, and the evidence of the plaintiffs having shown conclusively that the work terminated and the furnishing of materials terminated on the 15th or 16th day of December, and the lien notice introduced in evidence

shows that it was not filed or recorded in the office of the recorder of the Fairbanks precinct until the 21st day of March, which was several days beyond and above the prescribed time of ninety days following the termination of the furnishing of the labor and the furnishing of materials, and, therefore, the filing of the lien at that particular time is a void act on the part of the plaintiffs and was outside of the scope of the law governing the foreclosure and fastening of liens upon real property as established by the law of Alaska. Therefore, no foreclosure can be predicated upon the lien itself, as it is clearly outside the time limit given by the law for the filing and recording of liens.

Mr. Bell. Your Honor, he admits that the last material was furnished specifically in his pleading on the 23rd day of December in paragraph 2. In paragraph two of his answer he admits that it was that day, and the evidence shows that there was material furnished on the 23rd and the 24th both. Mr. Reed showed some little thing on the 24th even, but the 23rd was the last matter that was stressed except some small matter on the 24th, but he admits it was furnished on the 23rd, and that, of course, puts it within the period.

Mr. Clegg. If your Honor please, I would like to add a few words in explanation of that and in contradiction of it. It is true, as Mr. Bell states, that the plaintiffs, having alleged that the work ceased on the 24th of December, we admit it. We admit it clearly

under the mistake and misapprehension and misinformation with reference to the proof. Now they put a witness (297) upon the stand here, and he introduces the absolute records kept by the plaintiffs in this case which shows conclusively and the testimony of the witness, in addition, shows conclusively that there was a hiatus between the 15th and 16th of December, up until the 23rd or 24th day of December, which can't be shown except by their own records, and we assumed, of course, that when a matter of that kind is placed in a pleading that it states the truth. Therefore, without wishing to call for an explanation of the books, or showing of the books of the plaintiffs, the defendants erroneously admit the allegation in the complaint, that the work terminated and the materials caused to be furnished to this property on the 23rd of December; but we have now, your Honor, the exact testimony of the people who were supposed to know and who have kept a record of it, and by their own testimony and by their records, they show that at the time this alleged lien was filed that it was outlawed, and we certainly are not to be prohibited by insisting upon a substantial matter of that kind by an erroneous admission. It is clearly erroneous. It isn't the truth, and that is what we are here for—to ascertain what the truth is, so we ask the Court to allow us to amend the answer, if necessary, in that regard, and, instead of admitting that the work ceased, let us stand upon the proposition shown by their own evidence here that the work had ceased long prior to the

actual time and legal time fixed by the statute for filing of this lien.

The Court. You wish to amend that part of your answer, do you?

Mr. Clegg. Yes, sir, and show that we deny that it was filed on the 23rd or the 24th and insert in place of it the date shown by their own records—that it ended and terminated on the 16th of December instead of the 23rd or the 24th, whichever the pleadings show.

Mr. Bell. I object to the amendment.

The Court. It may be amended to *conform to the evidence*, (298) exception allowed plaintiff. (Italics ours.)

Mr. Bell. Your Honor, the evidence—I want to call your attention to that—the tickets show that work was done on the 24th and he testified to it.

Mr. Clegg. Your Honor, he said he got a service call by telephone to come out there and look at it, and they went out there and charged for one hour's time. That had nothing to do with the original agreement, nothing whatever.

Mr. Bell. He went out there and did the work on the 24th. He went out and fixed something that wasn't working.

The Court. That would be just a repair job. That wouldn't be part of the original contract.

Mr. Bell. The other was within the time. The 23rd is within the time, the material and work furnished on the 23rd.

The Court. The only other, as I recall it, was something on the 20th, the 16th, and the 20th is the very last.

Mr. Bell. Just wait a minute. Let me look at those cards as to dates—Here is one for the 27th.

The Court. There was no evidence about it.

Mr. Bell. I offered this, though, in evidence.

The Court. It doesn't make any difference, though, it wasn't received.

Mr. Bell. Now, Your Honor, may I reopen my case just to offer these particular cards?

The Court. I will permit you to reopen your case.

Thereupon Joseph Lane was recalled and testified as follows:

Q. I hand you a ticket, which seems to be an invoice marked plaintiffs' Identification No. 1 in this case, and I will ask you to state if you know who made the call or did the work on that?

A. I did the work.

Mr. Clegg. Just a minute. We object to this, your Honor, as supplementary to the *prima facie* case made by the plaintiffs and serves to contradict their own testimony and is (299) not permissible as rebuttal evidence, because there is no foundation laid for it, and otherwise it is irrelevant, incompetent, and immaterial.

The Court. No foundation has been laid for the use of any such memorandum yet, exception allowed plaintiffs.

Q. Well, is this an original, a part of the original records in your office?

A. Yes.

Q. Is that a part of the bookkeeping, general bookkeeping system of your office?

A. Yes.

Q. Now, when and under what circumstances are cards like that made?

A. They are made by the man, whoever did the work, at the time the work was done.

Q. And who did the work on the date indicated at the top of this time card?

A. I did it.

Q. Did you date it?

A. Yes, I dated it.

Q. Is it in your handwriting?

A. Yes.

Q. Now, then, did you at that time go upon the premises of the defendant at the ranch and do work there?

A. Yes.

Mr. Bell. Now, I offer this in evidence.

Mr. Clegg. Just a minute, your Honor. Well, that is the same thing that was introduced here by Mr. Reed: call on burner, labor, one hour, service; it says "service", and it is dated 12/24/44. That is the very identical thing Mr. Reed was talking about. We ask that it be excluded, your Honor, and disregarded entirely on the ground that it is incompetent, irrelevant and immaterial and has already been testified to by

a witness on direct examination, by Mr. Reed by direct examination and cross-examination.

The Court. Objection sustained, exception allowed plaintiff.

Q. Mr. Lane, what was the occasion for your going out to the ranch on the 24th day of December, 1944?

A. I was called out (300) there because they were having trouble with the oil burner.

Q. Is that the oil burner you had put in?

A. That's right.

Q. Was that a part of the regular contract work that you had done for them?

A. Well, ordinarily a service call, a service charge, wouldn't have been made there, but, due to the fact that they had taken that burner out themselves and worked on it themselves a few times, we made a service charge on that account, *and it was part of the original work.* (Italics ours.)

Q. And did you do the work after you got out there?

A. I did, yes.

Q. Have you ever been paid for this work?

A. No.

Q. *And this is included in the work that you and George Gilbertson talked over at the time you were going over those tickets?*

A. *That's right.* (Italics ours.)

Mr. Clegg. We object to that as irrelevant and immaterial.

The Court. Objection sustained, exception allowed plaintiffs.

Q. Was this ticket present when you and Mr. Gilbertson, George Gilbertson, were going over the charges and the dispute between you as to the charges and the labor done out there?

A. Yes, it was there with the other time cards.

Q. Was it one of the cards that was agreed upon by you and Mr. Gilbertson at that time?

Mr. Clegg. I object to that as incompetent, irrelevant, and immaterial, not proper direct examination at this time, and it is outside of the issues.

The Court. I think it is also incompetent. I will sustain the objection, exception allowed plaintiff.

Q. You did the work on the 24th day of December, 1944, for the defendants in this case?

A. Yes.

Q. And that was the occasion for making this particular charge?

A. Yes. (301)

Mr. Bell. We reoffer the card in evidence.

Mr. Clegg. We object to it on all the grounds already stated, your Honor, and that it is not proper rebuttal evidence and that there is no foundation laid for its introduction. It has already been testified to by one of the witnesses on the case in chief. It is incompetent, irrelevant and immaterial.

The Court. Objection sustained, exception allowed plaintiff.

Mr. Bell. Your Honor, may I say this, please: It is not rebuttal evidence. You allowed me to reopen my

case in chief, and this is evidence after you have permitted an amendment in the answer.

The Court. I am not ruling on it on the ground that is rebuttal. I ruled on it on the other grounds.

Q. *Was that work done under the same terms and the same circumstances as all the rest of the work done out there?*

A. Yes. (*Italics ours.*)

Mr. Bell. That is all.

Then on cross-examination Mr. Lane testified as follows:

Q. It was done just about as well as the rest of the work was, too, I suppose?

A. Are you competent to judge?

Q. I am asking you that question and I ask you to answer it.

A. I didn't hear a question. I heard a statement.

Q. Will the reporter please read the question?

(The following question was read by the reporter: It was done just about as well as the rest of the work was, too, I suppose?)

Q. You didn't understand that to be a question?

A. No, I didn't.

Q. You thought I was just talking to hear myself talk, is that it?

Mr. Bell. I object to that as argumentative.

The Court. Objection sustained.

Q. What did you do now—Explain to the Court now what you did in connection with this transaction.

A. I fixed an electrode in there. (302)

Q. How did you fix it?

A. I fastened it back up; taped it back in there.

Q. Taped it back in?

A. That's right.

Q. And that was a week after you had been out there before?

A. Approximately.

Q. Approximately?

A. Yes.

Q. What?

A. Approximately, yes.

Q. And you wrote down, you said, this memorandum on this time card? Did you say that?

A. Yes, I wrote it.

Q. You wrote the word "service" on there, did you?

A. That's right.

Mr. Clegg. That's all.

The following proceedings were then had:

Mr. Bell. Your Honor, I reoffer in evidence, now, all of the tickets, the original time cards, that I have offered before a time or two, on the identification that they have had now.

Mr. Clegg. We renew and ask the privilege of renewing our objections to this offer as it was originally made and originally objected to, and upon the further ground that the main case of the plaintiffs is closed, and the offer now comes too late.

The Court. Objection sustained.

Mr. Bell. Exception. That is all.

The Court. I will overrule the motion for a nonsuit for this reason: that although I believe the evi-

dence failed to prove a lienable claim, they nevertheless would be entitled to a money judgment, even though the lien failed, so that is the ground I will overrule it on.

Then George Gilbertson, one of the defendants, was called and testified in defense. "That he is in the hotel business now" and had lived in the vicinity about 11 years, became acquainted with plaintiffs about the time he hired them to put the plumbing and heating in.

That Mr. Walker brought Mr. Lane out there and introduced him as a plumber and steam fitter. We had the job and wanted to get it done so we hired Lane and Reed, they agreed to put the job in. We had a boiler out there and some radiators and fittings that we had bought down at a place that had burned up. That Mr. Lane told us that the boiler was not big enough but that he had one he would sell us:

"So Harvey and I go down and look at it with him. He wanted \$175.00 for it, but when we come to pay for it, why it was charged up as \$500.00." This conversation was with Lane. I told him we wanted a heating plant, we wanted a good plant in there. A plant that would keep it warm. It was suggested that a hot water system be used to start with. Mr. Lane claimed—electric unit heaters "That steam or water, whatever you are using, goes through the fans, through the tubes and the fans only—he claimed a hot water system wouldn't work in those unit heaters. So we put steam in there and we got the steam plant sitting out there now. It don't work. It couldn't keep the

place warm. It was put in by Lane and Reed. They put a new oil burner in to start with. He was supposed to put in an outfit that would work. It didn't work. We paid part of it at the time and a little here and a little there when they needed some money.

Then this question was asked:

Q. Well, on what basis was he to be paid?

A. Well, there was nothing stated about that.

(Page 60 of Transcript.)

Q. There was nothing stated?

A. Nothing.

Q. Was it a cost-plus basis?

A. Well, I heard Mr. Lane say that this morning. That is the first I knew of it.

Q. What did you understand it was?

A. I understood there was a heating plant to be put in there. So far as I know, when it was through and finished, and if it was a good job, I would pay for it.

They put the boiler in there. It took about six weeks to. (304) Some men came out there and worked for a short time and go back to town. We had four or five carpenters working out there; they had us tied up all the way through. It was in December when they got the plant working. I could not tell you the date. It never did heat the place. They had an oil burner in there. From what we understood, it was too small. They took it out and put another one in there. I know they had calls on it to go out and repair it but they never did repair it. Harvey bought another outfit from Wilbur's and put another heater in there, or

oil burner. (Page 62 of Transcript.) Lane and Reed had two of them. They put a new one in to start with and it run steadily; it didn't cut off so they put this old one in, an old worn out one. Apparently the pump didn't work, and it would explode. It sooted the whole place out there so then Harvey called up Wilbur's. He called Lane and Reed. They were out I guess, a time or two. Mr. Reed was out—as a matter of fact, I believe he came down to the hotel to see me and we went out to the ranch. I believe it was January, to see if they couldn't make a settlement. Mr. Reed said he would go in and see his partner; that he would rather do that than go to Court. The next day he slapped us with the lien. He never did come back after that. It never worked properly.

These questions were asked and these answers given:

Q. The question is, George, do you know of your own personal knowledge what was the condition of this heating plant at that time?

A. Well, it was unsatisfactory.

Mr. Bell. I move to strike that.

Q. Answer "yes" or "no". Do you know, or don't you know?

A. Yes, I do know.

Q. All right. Tell the Court now, what condition it was in.

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial, and he has not been shown to be qualified to answer. (305)

A. Well, this oil——

The Court. Just a minute. I don't know just what time you are referring to, Judge Clegg.

Mr. Clegg. The time that he said that they called up Wilbur, at that particular time, because the plant was not working satisfactorily. Now, what time was that?

The Court. Has he shown that a different one was put in?

Mr. Clegg. Yes, he answered that question.

Mr. Bell. Your Honor, I believe Mr. Clegg is wrong. I objected to that question, and you sustained it.

The Court. I don't think there has been any testimony that this witness knows when it was that his brother did call up Wilbur—that he knows of his own personal knowledge.

Q. Do you have any idea when that was?

A. I have no idea. I couldn't say.

Q. Was it before Christmas, or after Christmas?

Mr. Bell. I object to that. He has already answered that he doesn't know.

The Court. Objection overruled.

Mr. Bell. Exception.

A. I wouldn't say.

Q. You wouldn't say. Well, when was it that you found out that it wasn't working correctly and properly?

Mr. Bell. I object to that as assuming a fact that is not in issue.

The Court. Objection overruled.

Mr. Bell. Exception.

Q. Can you state about what time?

A. The date they put steam in the boiler.

Q. The date they put steam in the boiler. Well, they afterwards transformed it into an oil burner, did they?

A. It was an oil burner then.

Q. Huh?

A. It was an oil burner then.

Q. An oil burner then. What we want to find out, now, George, is what you know about the defects, the unsatisfactory condition, of this heating plant to do the work it was supposed to do. What was wrong with it to your own knowledge?

A. It wouldn't put out the heat for that building out there. It sooted the whole place up—stairs, downstairs—and all through.

Q. How long did that continue?

A. Until Wilbur put the new oil burner in there.

Q. Did you furnish the oil burner, or did Reed and Lane furnish it, or did Wilbur furnish it?

A. The last one that went in there, Wilbur put in there.

Q. How is that?

A. Wilbur put the last one in.

Q. Did you furnish it?

A. Harvey did. He bought it from Wilbur's.

Q. But Reed and Lane didn't furnish it?

A. No, they didn't.

Q. Well, did that, or did it not, correct the defects in the previous oil burner?

A. It kept the soot down.

Q. It kept the soot down?

A. It didn't soot the place up any more.

Q. Is that the one that is in there now to your knowledge?

A. That oil burner is in that boiler right now, in another boiler.

Q. In another boiler?

A. Yes.

Q. Who furnished that other boiler?

Mr. Bell. I object to that as incompetent, irrelevant and immaterial and not within the issues in the case.

The Court. Objection overruled.

Mr. Bell. Exception.

A. Through the Wilson and Wilcox plumbing concern here in town. (307)

Q. What did they have to do with fixing the heating plant, if anything?

A. They changed the whole works around, put in new fittings and a new boiler.

Q. Is that the outfit that is in there now, the heating outfit?

A. That is the one that is in there at the present time.

Q. What did you say their names are?

A. Wilcox and Wilson.

Q. Wilcox and Wilson?

A. I think that is their names.

Q. Huh?

A. I am quite sure that is their names—yes—Tommy Wilson and Whitey Wilcox; I don't know his first name.

Q. Now, just describe it, if you will, what was the character of the damage to the building caused by these previous burners?

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial and not within the issues here.

The Court. I think that is without the issues, isn't it? You didn't ask for special damages.

Mr. Clegg. We don't ask for any special damages, but I wanted to inform the Court as to the character of the damage, or destruction, which those burners caused to the interior of the building, being the burners that were installed by the plaintiffs in the action, just generally. I don't want to go into the details of it, but I would like to show that it was something more than a mere temporary and trivial destruction, item of destruction.

The Court. Very well, I will permit to you to show it.

Mr. Bell. Exception.

Q. Just generally speaking.

A. I understand it cost about \$1000.00 out there to wash the walls.

Mr. Bell. I move to strike what he understands.

The Court. Motion granted. (308)

Q. Just describe what sort of condition it was in.

A. Everything was all sooted up; it was all sooted up.

Q. What do you mean by "everything"?

A. The building, the curtains, and the clothing they had up there in the rooms, tablecloths and all linen; the whole building, in fact.

Q. What kind of linens did you have?

A. Well, it was sort of a linen for the tablecloths; curtains, and their clothing.

Q. Before this occurred, what was the condition of the interior of the building?

A. It was all new.

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial, and not within the issues presented.

The Court. Objection overruled.

Mr. Bell. Exception.

A. The building was all new, all varnished.

Q. What did you have to do to get rid of the soot, if anything?

Mr. Bell. I object to it for the same reason.

The Witness. We had to wash the whole interior of the building.

Mr. Bell. And now I move that the answer be stricken. It was given before the Court had an opportunity to rule on the objection.

The Court. The motion will be denied.

Mr. Bell. Exception.

Q. You wait a minute before you answer to give Mr. Bell a proper and full opportunity to make objections and don't answer then before the Court rules on them, so we will get along smoother and better all around. You said you had to wash the walls, or something, did you not?

A. Well, yes, they had to wash the walls.

Q. What sort of a job was that? (309)

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial and not within the issues.

The Court. The objection will be sustained.

Q. Well, did you have to employ any help to do that?

A. I believe we had about three men out there working.

Mr. Bell. I move to strike that. He said he believes.

The Court. Motion sustained.

Q. Do you know whether you did or not?

A. I know we had them working at washing the walls.

Q. How many people?

Mr. Bell. I object to that unless he knows how many people or who they were.

The Court. I will sustain the objection.

Q. Do you know who they were?

A. No, I don't know. I know the one man was Mr., and he had a couple of native women out there the day I was out there. The one day I was out there there were three. How many we had altogether, I couldn't tell you.

Q. Now in order to clean the place up, was it much of a job?

A. Well, yes. It is a—it is a pretty big job.

Q. How much did it cost you?

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial and not within the issues.

The Witness. It didn't cost me anything. Harvey paid for it.

The Court. Objection sustained.

Mr. Bell. I move the answer be stricken.

The Court. It may be stricken.

That Reed and Lane billed out the boiler at \$500.00, and afterwards changed it to \$175.00 as previously agreed upon. "My brother and I went down to Reed and Lane Plumbing (310) Shop and asked him about this \$500.00 for the boiler" and "Mr. Lane denied that he agreed to let us have it for \$175.00 so Harvey proceeds to tell him, he wants to know if he went insane, if he couldn't remember the deal we made.

"I never agreed to the correction of the bill; they were going to revise the bills which they did, and they came out more than they were originally. We never did accept the job as finished. We were dealing back and forth, they wanted to force us to the issue on it, and we wouldn't settle with them until they put the heating plant in shape and they never did. Mr. Reed said, 'I will grant you took an awful beating here. I will see if we can get you a new oil burner.' That was in January or February some time."

Q. Can you briefly itemize the defects in this heating plant as it was left by Reed and Lane?

A. Its defects?

Q. Yes.

A. We had oil burner trouble all of the time.

Q. What about the pump?

A. Well, there was no pump. The pump on the oil burner wasn't working. I guess it is worn out. The oil burner man tells us——

Mr. Bell. I move that be stricken, what somebody else told him.

The Court. It may be stricken.

Q. If there is anything you can state about it within your knowledge, I would like you to inform the Court.

A. Well, it had blown the doors off the boiler.

Q. It had blown the doors off the boiler?

A. A number of times.

Q. Huh?

A. A number of times.

Q. A number of times. What did you do with reference to repairing it?

A. Well, that Montgomery was in charge of the day shift there, my clean-up man, and he would call (311) up later in the week——

Mr. Bell. I object to him testifying about a conference, about somebody by the name of Montgomery.

The Court. Objection sustained.

Q. Do you know what we are talking about here, of your own knowledge?

A. Yes, I do.

Q. Well, did they do anything about repairing it?

A. Well, they worked on it, but never repaired it.

Q. They worked on it, but never repaired it. Now, where is this boiler you are talking about now?

A. It is sitting out there by the side of the building.

Q. Did you, or your brother, to your knowledge, notify Reed and Lane about it?

A. I understand Harvey went down and told them to come down and take the boiler.

Mr. Bell. I move to strike what he understood.

The Court. It may be stricken.

Q. Did you do anything personally?

A. I never did nothing in regards to that, no.

Q. Well, Harvey is right here?

A. Yes.

Q. The burner as well as the boiler is outside?

A. *They are both sitting inside.* (Italics ours.)

Q. They never came after them?

A. They never did.

Q. So far as you know?

A. They hadn't up 'till last night.

Mr. Clegg. That is all.

Mr. Bell. I move to strike all of his testimony about the boiler not working, the burner not working, and the sooting of the place, for the reason that it is outside of the issues, and there is no dispute, there is no contention that it was a contract to do anything except furnish some labor and material; and this is not defensive matter, because if they had made a contract to do some particular thing for a certain amount, it would be an implied warranty that it (312) would work, but there is no testimony of any implied warranty, and I move to strike that part of the answers.

The Court. Motion denied.

Mr. Bell. Exception.

And on cross-examination he testified as follows:

Q. Mr. Gilbertson, you say you went with Harvey to see this boiler before you put it in out there?

A. Yes, I did.

Q. Where did you go to see it?

A. It was laying down by Lane and Reed's plumbing shop.

Q. Now what was the occasion for going there to see this boiler?

A. Because Mr. Lane told us to come down and look at it.

Q. Did he tell you it was an old one?

A. He did. We could see that.

Q. It showed its age there, didn't it?

A. Well, I don't know nothing about how old it is.

Q. You are a steam fitter, aren't you?

A. I was about fifteen years ago.

Q. You were in good standing as a steam fitter?

A. Yes.

Q. Now, when you saw this boiler, he offered it to you for \$175.00, didn't he?

A. He did.

Q. What would a boiler like that new be worth up here in Fairbanks at that time?

A. At this time of the year?

Q. No, at that time you were talking to them, that they were talking to you, down there?

A. I couldn't tell you.

Q. It would be worth a couple of thousand dollars, wouldn't it?

A. No, absolutely not.

Q. Well, what would it be worth, in your opinion?

A. I don't know.

Q. It would be worth a great deal more than \$175.00 (313), wouldn't it?

A. If it was new, perhaps it would.

Q. Now, did he tell you at that time that this was a second-hand boiler and where he had gotten it?

A. I understood it come out of the Star Airlines hangar.

Q. Now, it was pretty near impossible at that time, Mr. Gilbertson, to get new equipment here in Fairbanks, wasn't it?

A. We had a boiler out there to put in, and Mr. Lane said it wasn't big enough.

Q. Answer my question. It was pretty near impossible to get a new boiler here at that time, wasn't it?

A. *I imagine it was.* (Italics ours.)

Q. And it was pretty hard to get any equipment at that time?

A. You could get any equipment you wanted.

Q. You could?

A. I could.

Q. Why did you buy this second-hand boiler then?

A. I believe you answered that.

Q. You couldn't get a new one, could you?

A. I didn't try to.

Q. You never tried. Now, these oil burners, at the time, they were pretty scarce at that time?

A. No, I believe there was some in town.

Q. Some in town. Now, he first put in a small burner that was a brand new one, didn't he?

A. That's right.

Q. And he told you when he put that in it was pretty small, but he thought it would work all right, didn't he?

A. I don't recall that.

Q. He charged you at that time for the new burner, didn't he?

A. I paid him for it right there.

Q. How much did you pay him for it?

A. I gave him a check; I believe it was \$250.00.

Q. And you were later given credit for the \$250.00 on the statement of account between you people, weren't you?

A. Well, there is some difficulty on them statements there. (314)

Q. Do you have the check with you?

A. I haven't got it with me, no.

Q. The sum was for \$250.00, wasn't it?

A. I believe it was. I believe it was. I am not certain.

Q. Mr. Gilbertson, you saw a paper, a statement, like this only it was white. I believe the statement, the original copy, that they had out at the place was white, was it not?

A. I believe so, yes.

Q. Now, turn over the second page. You notice a credit for \$250.00 on 11/25/44.

A. Approximately there.

Q. Yes, that is approximately the date. 11/25/44 is the approximate date—for \$250.00. Now, that is the \$250.00 you are talking about paying, isn't it?

A. Like I said, I am not sure what the check was. I said I believe it was about that.

Q. Now, Mr. Gilbertson, your experience as a steamfitter over the years that you were a steamfitter, had taught you something about what would equip your building, hadn't it? You knew pretty well what would equip it?

Mr. Clegg. I object to that as irrelevant and immaterial. It is a proposition, your honor, where these parties are claiming something for the work, experience, and materials that they furnished and what Mr. Gilbertson, the witness now before the Court, knew about it fifteen years ago at some unknown place is wholly immaterial and irrelevant.

The Court. Objection overruled.

Q. *The years that you worked as a steamfitter had naturally qualified you to know pretty well what it would take to properly heat your building, hadn't it?*

A. *Well, I should know a little bit about it.* (Italics ours.)

Q. Now, you saw that boiler before you bought it, hadn't you?

A. Yes, I did.

Q. And you saw the burner before it was put in, didn't you?

A. I didn't see it until it was laid out there. I saw it in a box. It was the only time (315) I saw it.

Q. How long was it out to your place before it was put in?

A. Well, it was sitting there quite a few days.

Q. It set there all of the time they were setting the boiler, didn't it?

A. No.

Q. Well, how many days?

A. Oh, it was perhaps, say, a week or ten days before it got put in.

Q. Now, do you remember a conversation between you and Mr. Lane about this burner before it was put in?

A. Such as what?

Q. Well, did you have a conversatiton with Mr. Lane about this new burner?

A. All I know is we bought the burner.

Q. Didn't you talk about the burner any?

A. Not that I recall of.

Q. Now, the, you were to pay him \$250.00—or, did you pay him \$250.00 for that burner, didn't you?

A. I believe that was what they charged for it.

Q. Now, after it was in there a while, that burner didn't soot anything up, did it?

A. It didn't heat the boiler.

Q. Wasn't your complaint, Mr. Gilbertson, that it had to run too much of the time, or practically all of the time, to keep the boiler hot?

A. Well, it was running practically steadily.

Q. *It did keep the boiler hot when it did run practically steadily, didn't it?*

A. *Well, yes and no.*

Q. *Well, now, did you set a radiator yourself there?*

A. *Yes, I did.* (Italics ours.)

Q. Now, that wasn't set by Mr. Lane, was it?

A. No, it wasn't.

Q. Now, did you have any trouble with the radiator out there not heating, and then have a conversation with Mr. Lane about it?

A. We put the one in first, and then, after the plant was in and working, they put another unit heater in there. I don't know nothing about these unit heaters.

Q. You don't know who put the unit heaters in?

A. Lane (316) and Reed put the unit heaters in.

Q. You say when they revised the bill it was more. You do remember that the reason was that these unit heaters had been shipped up from Seattle to the depot and were taken directly from the depot to your place and used, and that wasn't in the original bills?

A. I don't know whether they were billed there or not.

Q. Will you take that bill and see if you can find those unit heaters in there, please? I am asking you, Mr. Gilbertson, about this itemized statement that you testified was changed. You have it there. Please check it and see if there is any unit heaters charged in that statement?

A. I believe that Mr. Lane and Mr. Reed brought that up and had it charged.

Q. Will you look through there and see if there is any charge to you in that whole bill for the unit heaters?

A. I don't see them on there.

Q. You don't see them on there. I will ask you if on this statement, if they are not on the corrected statement, this bill being, "This cancels and supersedes all previous billings." You do find the two unit heaters in there, don't you?

A. That is not an itemized statement.

Q. Well, they are charged as \$97.50 each, \$195.00?

A. \$195.00.

Q. They were not on that statement?

A. I believe there was something brought up about those. I am not certain what that was.

Q. You and Mr. Lane talked that over, didn't you?

A. I believe it was Mr. Reed.

Q. Now, I notice that you have totaled—is that your figuring on the front: \$2382.81? Is that your figures?

A. I wouldn't say, but I could tell you.

Q. You think if you added those three adding machine slips, you would get this \$2382.81?

A. I am sure these are——

The Court. Just a minute. Will the witness get on the stand?

A. I am sure they are not my figures. (317)

Q. Now, will you please check the totals on the two and see if the one on your knee isn't twenty-one hundred and some dollars, the total charges out there, twenty-one hundred and some dollars?

A. Yes, but the credits are \$667.48.

Q. Then what does the yellow slip show as the balance due, the little yellow slip on your leg?

A. The last?

Q. Yes.

A. According to their figures, it is \$1429.76.

Q. Well that is less than the figures that you have on the ticket in your left hand, isn't it?

A. There is no credits on these, you see.

Q. There are no credits on them. Taking the credits off, even that is less; it is about \$400.00 less if you consider the unit heaters, isn't it, Mr. Gilbertson?

A. No, I won't say that it is.

Q. Well, twenty-three hundred and some dollars on one and twenty-one hundred on the other, and the last one, twenty-one hundred, has the two unit heaters in it of \$195.00, don't it?

A. To tell you the truth about it, the way they have it mixed up, I don't know how anybody would understand it.

Q. Are you a bookkeeper, Mr. Gilbertson?

A. No, I am not.

Q. Do you know where it says "credit" and "charges" and "balance" up at the top there, at the top of the page, where they start off?

A. We have two credits here.

Q. I mean this, starting right there. Now, you have a number of credits under the column for credits, don't you?

A. I see that.

Q. Now then, the balance that that itemized statement shows is fourteen hundred and how much?

A. It says here \$1429.76, according to Lane and Reed's figures.

Q. \$1429.76. You had a statement like that before you when you and Mr. Lane were in a conference together, didn't you?

A. No. Mr. Reed.

Q. You first had one, you and Mr. Reed, and had these tickets?

A. Mr. Reed, not Mr. Lane, brought this out to the Ranch.

Q. You and Mr. Lane had these tickets before you?

A. No (318) he brought this statement here with him and we checked those.

Q. And you checked those tickets?

A. We checked them.

Q. There were some credits allowed on account of some error, wasn't there?

A. I could see stuff I purchased other places, at Palfy's plumbing shop, Wilbur's plumbing shop, the N. C. Company, and the Sampson Hardware, which Lane and Reed had charged out against us again.

Q. You were given credit for \$60.00 that day for the return of some stuff that you had bought from Palfy?

A. Palfy, the N. C. Company, Wilbur and Sampson Hardware.

Q. And that \$60.00 was agreed upon between you and Mr. Lane that day?

A. Lane and Reed just took all the fittings out there at that place and took them to town.

Q. How much was that?

A. I don't know.

Q. They took what was out there?

A. They took what was out there, what we had there ourselves.

Q. You and he agreed on an adjustment of \$60.00 credit?

A. He said he would allow \$60.00. I don't know what he took, but I know he got \$60.00 worth.

Q. Did you agree to the \$60.00?

A. I did. There was nothing else to do.

Q. All right, sir. Did you ever call Reed and Lane to come out there about anything when they didn't come?

A. Yes, I did. I called them time and time again when they were working on the job, supposedly.

Q. Did you ever call Mr. Lane and talk to Mr. Lane about this heating system not working when he didn't come to see it?

A. No, I didn't myself.

Q. You didn't yourself?

A. My brother was out there. He took care of that.

Q. Now, this burner that is charged at \$100.00, and you are credited for \$250.00 for the return of the new burner, was the \$100.00 burner an old burner?

A. Well, they charged me for two (319) burners.

Q. You are credited with one at \$250.00?

A. That one we paid for.

Q. And you are only charged on the ticket there with one burner, aren't you?

A. We are charged out with two, I believe.

Q. No, this ticket that you and Mr. Reed went over, the corrected statement?

A. This is the one he brought out to the Ranch, the copy of this one.

Q. That one charges you with only one burner at \$100.00, doesn't it?

A. Yes, that's right, I believe.

Q. And it says, "as agreed". Now, that was a used burner, wasn't it?

A. Yes, it was.

Q. It was an old one, wasn't it?

A. I understand it was.

Q. Now, that was a pretty good sized burner, wasn't it? It was rather large?

A. I don't know anything about oil burners.

Q. But it was larger than the small one you had in it to start with, wasn't it?

A. It looked like it was large.

Q. *When it was working, it heated the boiler adequately didn't it?*

A. *When it did work, yes. (Italics ours.)*

Q. You didn't know that was a second-hand, old burner at the time you had him take the old one out and put a new one in?

A. My brother called them up and had them bring this other burner out there, because the other one would not keep the boiler warm.

Q. Now, when did you leave out there and go to your other business in town?

A. They took over the 1st of December.

Q. The first day of December, 1944?

A. That's right.

Q. So the work done from then on, what matters that were hauled out there, were handled with Harvey, isn't that right?

A. That's right, sir.

Q. All right, now, he did correct that charge, that original billing of \$300.00 for this boiler? He agreed to reduce that to \$175.00 on that ticket, didn't he? (320)

Mr. Clegg. I object to that as already having been testified to.

The Court. Objection sustained.

Q. Now, when you hired them to do the work out there, it was—they didn't make a contract to furnish you any particular thing or to do any particular thing? You hired them to go out there and work at so much an hour and furnish certain materials?

A. He had us charged up, to start with, on supervision, and we had that cut off.

Q. Where is that?

A. He had that on his own ticket. He had supervision charged at \$3.50 an hour, if I remember right.

Q. Then you did have an agreement with him about supervision, didn't you?

A. There was no agreement. I was dealing with Mr. Lane entirely.

Q. You were dealing with Mr. Lane entirely?

A. That's right.

Q. What did you tell Mr. Lane about supervision?

A. I called him up. He was giving us, just like the Walker Construction Company give us, a little run-

around out there. They agreed to do a job for \$1000.00, and we ended up paying \$1700.00. I told him, "Don't go pulling a Walker Construction trick on us, because we won't agree to it."

Q. Then did you explain to him what you meant? Did you talk to him about supervision?

A. He tore those cards up; I believe he did, because he never charged us out with it after that.

Q. Mr. Gilbertson, you told him you didn't want to be charged any more with supervision?

A. We didn't feel like paying three and a half an hour for supervision.

Q. Mr. Lane, then, never charged you any more for supervision?

A. Well, he said this morning that he charged his own labor up.

Q. It was just his labor, wasn't it?

A. He charged his labor up, yes.

Q. Now, then, Mr. Gilbertson, you had someone out there keeping time, too, in the matter, did you not?

A. Yes, we did (321) that.

Q. You and Mr. Lane checked those two records against each other?

A. We did that.

Q. And he allowed you nine hours that your account didn't show, and he took off nine hours and gave you a credit for \$27.00, didn't he, on that ticket so it would match your charge?

A. He took off \$27.00 one place and \$28.50 one place and \$2.00 another.

Q. Now, then, when he took those off that would leave the tickets, then, credited with the hours that you had, according to your record?

A. It still doesn't correspond.

Q. Well, you had your books and his together when those credits were made, didn't you? These tickets and your tickets were all there, weren't they?

A. He did take his own card. "Well," he said, "I won't run those through on the charge, then." That was \$3.50 for supervision; I believe it was three dollars and a half.

Q. He took those off and gave you credit for them, didn't he?

A. There is a \$58.00 credit here for his labor, I guess it is.

Q. Well, there is nine hours of labor, \$3.00 an hour, for a mechanic, isn't it? Doesn't it show there?

A. Nine hours and one-half one place, and nine hours another place.

Q. Nine hours for a mechanic, at \$3.00 an hour, \$28.50?

A. Nine and a half hours.

Q. Nine and a half hours?

A. \$28.50.

Q. That is a credit to you, isn't it, under the column of credits?

A. There is a \$58.00 credit there.

Q. Then there is a \$2.50 credit for a helper, one hour for a helper, two and a half?

A. Total, \$58.00.

Q. Now, he consented to give you that credit because of the difference in your time-keeping, didn't he?

A. Apparently he did, yes.

Mr. Bell. That is all.

Mr. Clegg. That is all.

Then Harvey Gilbertson was called and testified in his own behalf that he was interested in The Ranch close to Fairbanks; that he knew Reed and Lane; that he had business dealings with them in 1944 from October or November; that they were to put in a heating plant; that he worked at The Ranch all the time; "We had to have a heating plant and we went to them about it; they said they would put one in; they did it, but it never did work. They put in a boiler and an oil burner to heat it and some radiators and pipes. We already had those but some of them I guess they furnished, those that were shipped up here. They were what you would describe as electric unit heaters. I guess they were through, but it was never working when they did get through. I found that out as soon as they started the outfit out because it was supposed to be complete but it wouldn't work.

Then this question was asked (Tr. p. 90):

Q. What was wrong with it briefly?

A. I don't know. I just don't know much about it myself.

Q. You don't know much about it yourself. Well, what effect did it have on the interior of your building, if any?

A. Well, it dirtied it all up.

Q. How much and how badly?

A. Well, I don't know; just soot all over the building, all over our clothes, and all over things in the dining room and everything.

Reed and Lane were informed of the condition, they came out and adjusted it a few times, four or five times, it made it worse I believe; about the same I believe. The first one was a small burner, it didn't heat the place, the second one was larger, it didn't heat it either, and that is the one that caused all the dirt and soot.

Then this question was asked:

Q. How did that dirt and soot originate? What was the cause of that?

A. I really don't know, only when it would shut down and then start up, it would just blow off the doors, or open, rather, and then just a lot of soot would come out all over. (323)

Then the following questions and answers and proceedings were had:

Q. Was your interior perceptibly hurt?

A. Yes.

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial and not within the pleadings.

Q. Just generally speaking.

The Court. Objection overruled.

Mr. Bell. Exception.

Q. Just briefly; don't go into the details.

A. Well, it just dirtied the place all up.

Q. Was it slight or trivial?

A. Very bad.

Q. What?

A. Very bad, yes.

Q. What did it require you to do?

A. Get a lot of help and wash it all down and clean it all up and send the clothes and everything to the laundry and cleaners.

Q. Then after you got that done, did they do anything more to it?

A. No, I didn't do that until after we got that burner out of there, because there was no use. There was nothing we could do. We took some of our things out of there.

Q. What about—did you have to take the burner out, you say?

A. Yes.

Q. Then what?

A. Well, I called them several times to come and fix it, and they never did, and it didn't seem like they could, so I got to work. There was no use; I couldn't keep on going forever, so I called another oil burner man.

Q. Who?

A. Mr. Wilbur, and we had there the fellows who were working for him, and they came out.

Q. What did they do, if anything?

A. They put in a new burner.

Q. A new burner?

A. Yes.

Q. How did it work after that?

A. Well, there wasn't any soot, but it just didn't make the place warm enough.

Q. It wasn't efficient in heating the place?

A. That's (324) right.

Q. What did you do after that?

A. Well, it finally winds up having to have a whole new system put in.

Q. Who did that for you?

A. Wilcox and Tommy Wilson.

Q. About when?

A. This last fall.

Q. Last fall. Do you mean in December?

A. No, earlier than that.

Q. What?

A. Earlier than that.

Q. Earlier than that?

A. Before the cold weather set in.

Q. Before the cold weather. Was that an efficient heating outfit?

Mr. Bell. I object to that as calling for a conclusion of the witness. He has not shown himself competent to testify as to whether it was or wasn't.

The Court. Objection sustained.

Mr. Klegg. He can tell whether he was freezing to death or not.

The Court. Objection sustained.

Q. How did the one work that Wilcox and Wilson put in?

A. It works very good.

Q. Is it there now?

A. Yes, sir.

Q. *What did you do with the old plant, if anything?*

A. *It is still sitting out there.*

Q. *Where?*

A. *Well, in the addition that we built to put it in.*
(Italics ours.)

Q. Did you do anything about notifying Reed and Lane about it?

A. Yes.

Q. What?

A. Well on the burner, when we first took that out, I called them a couple of times to come and get it, so they didn't; so then I went to them when I got this other system in and went to the store there and told them to come and get the boiler if they wanted it, so he said, well, he didn't want it.

Q. They didn't want it?

A. Yes. "Well," I says, "It is (325) no use to me. Somebody might be able to use it." "Well," he says, "we will come to take it and give you credit for it." But they never did come.

Q. It is still out there, you mean?

A. Yes.

Q. How much did you pay for that boiler? What did they charge you, I mean?

A. Well, at first it was \$175.00 and then \$500.00, and then back to \$175.00 again.

Q. Did you at any time agree with them as to the amount to be paid for their services?

A. No.

Q. Did you, at any time, accept the work that they did out there as a finished job?

A. No, sir.

Mr. Bell. I object to that as a conclusion. The circumstances would control.

The Court. Objection overruled.

Mr. Bell. Exception.

Mr. Clegg. You claim that in your papers, in your pleadings.

Q. You never did have any agreement to that effect with either of them?

A. No.

Q. Speak a little bit louder, please.

A. No, I never did agree to it that it was finished. I tried to get them to come out and fix it some way, so it would give us some heat.

Q. Was that before you finally had Wilson and Wilcox work on it?

A. Yes.

Q. Who were they? What did they do?

A. Well, after they didn't come, I just had them come out and see what they could do.

Q. Who are they?

A. Well, they are two plumbers that got a shop here. I think they have a shop here. I have never been in it.

Q. Well, they are in the business——

A. Yes sir.

Q. ——of heating?

A. That's right.

Mr. Bell. I object to that. He says they were plumbers. (326)

Q. Do you know anything about what their occupation is, what they do?

A. Well, I guess they put in heating plants—plumbing.

Mr. Bell. I move to strike that he guesses. He says he guesses.

The Court. All right. It may be stricken.

Q. What did they do for you?

A. They put in a heating plant.

Q. A good or bad one?

A. A good one.

Q. That is the same one you are now using?

A. Yes, sir.

Mr. Clegg. That is all.

On cross-examination, Harvey Gilbertson testified as follows:

Q. Mr. Gilbertson, you stated that it was put in in 1944 by Reed and Lane, didn't you?

A. Yes.

Q. And you used that up until the fall of 1945, you say?

A. Well, we did, yes.

Q. Now, Harvey, did this—does this burner that you have in there now, is it the same size as the small burner that you had when Reed and Lane put it in the first time?

A. I really don't know.

Q. Well, does it look about the same to you?

A. I haven't any idea, because it has been gone for quite a while. I never saw the two together.

Q. Now, do you know whether it was you or George, or who was it, had the men change the small burner for the old second-hand burner?

A. Well, I think George was the one who had most of the doings of that.

Q. Well, Harvey, you knew when they put that old burner in there that was a second-hand burner, didn't you?

A. Yes.

Q. And they only charged you \$100.00 for it?

A. I believe that's right.

Q. And I believe they told you if you didn't like it they would give you a \$100.00 credit?

A. They agreed to put in a (327) new burner as soon as they could get one.

Q. You didn't pay them and you got in a lawsuit, isn't that right?

A. Yes, that's right. We wanted some heat. If they had fixed the heating plant, we would have paid them.

Q. They offered to take the old burner out at any time they could get one big enough—you or they, either one—and they would take it back and give you a full \$100.00 credit for it?

A. That's right.

Q. And this fuss came up and you wouldn't pay them?

A. No.

Q. And they got in a lawsuit and filed a lawsuit against you?

A. No, not until they wouldn't come out and do anything about fixing the burner. Everybody else had burners.

Q. You don't know where the burner came from that the other people got, do you?

A. No, I don't.

Q. Now, you did use this one for a year?

A. Well, not quite a year.

Q. Well, you used it from—it was put in out there on October 10th or 12th, wasn't it?

Well, we didn't start using it until December because we were closed down for quite a while while they were putting it in.

Q. Now, this burner you got in out there now is new equipment, a full new outfit, isn't it?

A. Well, it is the same burner that Wilbur put in the old boiler. It is the same burner.

Q. It is a new burner, though, isn't it?

A. It was, yes.

Q. What kind of a boiler do you have out there now?

A. I don't know what you would call it.

Q. Is it any larger than the old one?

A. No, it isn't as large.

Q. It isn't quite as large even, is it?

A. No.

Q. And Mr. Wilbur put that in for you?

A. No, sir.

Q. Who did put that in?

A. The boiler? Wilcox and Tommy Wilson.

Q. Is that a new boiler that is in out there now?

A. I believe it is.

Q. A new burner and new boiler?

A. The burner was used in the old boiler for a while. I bought it from Wilbur.

Q. Do you remember what you paid for the new burner?

A. I believe the burner was—I believe it was \$182.00 or \$185.00.

Q. Do you know what you paid for the boiler, the new boiler?

A. Well, that was put in with the job, on this job that they did.

Q. What did they charge you for putting that in?

A. The complete job, I believe, was \$1255.00, something like that.

Q. Was that boiler approximately \$1000.00?

A. No, that included all of the work and everything.

Mr. Bell. That is all.

Mr. Clegg. That is all.

Mr. R. H. Heider was then called to testify for the defendant and was interrogated by Mr. Clegg; he testified that his name was R. H. Heider, was an oil burner mechanic, lived in Slaterville, 407 Minnie, lived in Fairbanks almost three years, worked for the engineers at Ladd Field and for the Alaska Road Commission and for himself, and some work for Wilbur, oil burner work, setting up oil burners. He

knew the plaintiffs in the case, knew the defendants did work for Gilbertsons while he was employed by Wilbur in the latter part of February or the 1st of March, 1945; he put in a new burner in the boiler, cemented it in and run a small amount of cement around the base of the boiler where soot had come out and that was all. The boiler was on a small base he noticed the crack about three-eighths of an inch, or one-half of an inch, he took cement and run it around the boiler to seal that crack up to keep the soot from coming out. He saw the boiler three or four times, possibly a half dozen times. He could not tell whether sealing had been placed originally on the boiler. He shortened the fire box and narrowed it slightly approximately four inches on each face. He felt that in putting in a different burner that he needed a different size fire box so he changed it; (329) made it a little smaller to fit the tip that he had. He took the burner out that was in there, put a new one from Wilbur's in and started it up. (Tr. p. 101.) "I know nothing about the boiler, only the burner. The boiler so far as I know is primarily a coal burning boiler and it was attempted to be transformed into an oil burner. It took me three hours to change it, to change the burner, and then I went back two or three times for a period of ten or fifteen minutes each time just to see how it was working. I was taken upstairs and shown what the condition was all through the house, part of the building, the living quarters and dining room, I went down and looked at the boiler and attempted to seal it against blowing further

soot in case the burner did do it. It was soot from the boiler. It was the only place it could come from—the boiler and the burner. The soot was on the walls, on the window sills, tables and tablecloths and different furnishings. It was sooted up; you could see it. There was soot all around the place, there was no other place that I know of, no other stove that could have put it and it was thicker in the boiler room than anywhere else.

Then on cross-examination he testified:

That he worked out there the latter part of February or the first of March, just replaced the burner, he had nothing to do with the boiler, no knowledge of it. Knew nothing of boilers, only burners, not a steamfitter. "I don't know anything about boilers, I am no steamfitter at all. I am a technical engineer, architect and draftsman. Don't belong to any mechanic's union. The burner I took out was an oil burner, the physical dimensions of the whole (old) burner was larger than the new. He testified that he was an automobile mechanic.

Merele Wilcox testified on behalf of the defendants, that he lived at 214 66th in Fairbanks, ever since 1943, was formerly employed by Reed and Lane, plumbers and heating company. He is now working for himself at 1506 Third, has a partner by the name of Tom Wilson doing business as Economy Plumbing and Heating. He knows the plaintiffs Reed and Lane, had worked for them; knows the defendants Gilbertsons, has known them about the same length of time

he knew Reed and Lane. He worked on the Ranch job for Reed and Lane toward the last part of the job. He was supposed to be a fitter. Wilson is a plumber. He was working for Reed and Lane, he hooked up some radiators and return lines. *He examined the boiler and the boiler itself was all right so far as he knew*, it was not a new boiler, it was a used one. He sealed it up, the sections of the boiler. There was a pump on the burner in poor condition, the burner wasn't in too good a shape, *he just disconnected the pump and run it through without the pump*. He hauled it out there in a pick-up, it was stored in the Nazarene Church. (Italics ours.)

Then these questions were asked and these answers given:

Q. At the time you put in this burner, did you think it was fit and serviceable for the job it was expected to perform?

A. Well, the burner itself wasn't what, wasn't up to snuff. That is, it wasn't like a new burner. *It was an old burner, and the way I understood it—of course, I was just working there; I didn't handle any of their business, or anything—but it was a temporary set-up, so far as I know*. I don't know the full details of it though. (Italics ours.) (Tr. p. 108.)

Q. Do you think it was competent to perform the work that it was required to do.

A. Well, the burner was large enough to handle the job if it was working properly. The way things turned out, it just didn't work right. Once or twice—

or, how many times I don't know; I wasn't there—I know it didn't operate properly at all times.

Then on cross-examination he testified *that it was the understanding it was to be used as a temporary burner until a better burner could be obtained*. He put the large burner in (331) there, adjusted it to the best of his ability; it was an old burner at the time; *the new burner was taken out before he started to work*. He didn't remember who took the old burner out. The boiler so far as working right was all right. The trouble with the burner was that it was just too old. That it was just put in there for temporary use and when a better burner could be obtained it would be taken out and a new burner put in. (Italics ours.)

Tom Wilson was called and testified for the defendants: That his business is plumbing and heating. His shop is at 1513 Third; Mr. Wilcox is a partner, the witness who just left the stand. "We are in our fourth month's business." Has recently done work out at The Ranch, put in a heating system there. Got through on or about the 16th day of December. We used the unit heaters and radiators, we made a deal on the boiler, it was accepted. We put a brand new boiler in there. Personally, I am not a fitter.

Then these questions were asked and answers given (Tr. p. 112):

Q. What was the matter with the one that was in there, if anything?

Mr. Bell. We object to that as assuming a fact not in evidence, that there was anything the matter with it.

The Court. Objection overruled.

A. They claimed it wasn't heating properly.

Mr. Bell. I move to strike that; they claimed it wasn't heating properly.

The Court. It may be stricken.

Q. Don't you know generally? You don't have to go into any great details. From your examination of the heating plant there, what was wrong with the boiler?

A. Well, personally, I am not a fitter; I don't know.

Q. You couldn't say?

A. No, sir.

Q. Did you examine it?

A. I never paid any attention to it, it just was there. (332)

Q. Well, who determined to take it out?

A. The Gilbertsons.

He further testified that they wanted a system that would work; that the two of them put in the burner and the boiler; that the boiler was new; the system after put in worked good, made several trips out to verify it, everything was going along fine. Don't know the difference in capacity of the old one and the one we put in. The old one looked awful big to me. I just fixed a few leaks so far as the plumbing end was concerned. The burner we put in is using less than half

of what the other one did. *Four more radiators were put in.* (Italics ours.)

On cross-examination he testified:

We put in a hot water system. You don't have to be a steam fitter to put that in, plumbers do it. We put it in the basement of the same building. I formerly worked for Reed and Lane. *I believe Mr. Lane is a good mechanic,* the boiler he (we) put in could be used either for steam or hot water, it was about one third as big as the old boiler. (Italics ours.)

There are probably more sectional boilers installed by plumbers than by fitters, and so far as this boiler is concerned I would install a little bit smaller one with three men in a day. I have done that. It would depend on what kind of equipment you use as to whether or not it would take one hundred hours.

W. A. Montgomery was called and testified for the defendant:

That he had been in Fairbanks since the 4th of April, two years ago. He knew Reed and Lane, knew the Gilbertsons since the 10th of May, two years ago, knows the Ranch outside of town. Has had connection with the enterprise out there. Was carpenter and bartender, and overseer at times, plumber, cement man, Jack-of-all-trades, just a small amount of plumbing experience, hooking up toilets, casings, sinks and one thing or another. I have done no extensive work at it. Have met Reed and Lane several times, remembered when they worked out there. Couldn't remember the dates but they worked in November and December,

1944, putting (333) in a steam heating plant, observed the amount of time they put in from November 30, to December 5th along in there, kept track of their time, they had one or two and sometimes three men there. I think five was the most men they had there. I don't think it was over two days that they had five men. Saw Lane off and on. His time out there varied with the different times he would come out to see about and do. Heard Mr. Reed's testimony about a rail that his firm put around the place there for dancers. Didn't see Reed do it. Stated he did it. It was just a one-half inch pipe around the band, the orchestra, a pipe railing around the band, something like this raised place here. The rail is two feet high. It is still there. So far as I know he was the only man that worked on it.

On cross-examination he testified (Transcript 121):

The pipe and fittings came from Reed and Lane plumbing shop, it was all short lengths, I think it was only two pieces of pipe that they cut. *Reed and Lane furnished the fittings that went in this railing.* It is a flange of some kind in the front. They furnished these flanges too. There were six galvanized floor flanges bought, but only five used. There was some three-fourths inch galvanized tees used, two and one-half inch galvanized L's used also, there were twenty-four feet of one-half inch black pipe used, *this was prepared and turned over to the witness down at Reed and Lane's shop,* it took about two hours to put it up. That he made a list of the time used by the men and his list and Reed's time cards, or Lane's time

cards were gone over by George Gilbertson and Lane together, they said they did. He wasn't present when they went over them. (*Italics ours.*)

Then Jack Wilson was called and testified for the defendants; he testified that he lived at 704 Thirteenth, town of Fairbanks, since '43. Came from Juneau, contractor and builder, worked for Gilbertsons out at the Ranch in 1944. Had some men out there at the time, was remodeling the interior, had between four and five men, and it gradually ran down to two, was carrying on his work while Reed and Lane were installing the heating plant. Was there some of the time while they were installing the heating plant. They were not there all the time he was working. He was delayed in his work because of them not being there to put the pipe in, his job ended in December right after the first, was there later and saw the damage, Mr. Gilbertson took him to the interior and showed him how much damage was done. It was oil soot, required considerable cleaning all through the upstairs as well as the downstairs, the floors, walls, drapes, clothing and rugs and even the door knobs were covered with it.

These questions were asked and these answers given:

Q. Well, were you there at any time when the boiler exploded?

A. It didn't exactly explode, but it would blow the oil in. As I gathered it from being in and out of there, it blew the oil in, and there was a little electrical device on the front of this nozzle that ignites the oil,

and, when the cold oil hits this hot fire brick, it creates a gas; and, if it isn't ignited immediately, why it will eventually cause explosions. Where there is too much of it in the air, it just blows soot and back fires and explodes, as you call it.

Q. Were you there at any time when the doors of the boiler——

Mr. Bell. I move to strike the answer of the witness, because it is an opinion, and he is not qualified as an engineer or an expert on oil burners or this kind of work.

The Court. Objection overruled.

Mr. Bell. Exception.

And on cross-examination, Mr. Wilson testified as follows:

I was mostly working for myself in 1944, that is building my own home until Mr. Gilbertson asked me to come out and remodel his place. I didn't do that by contract, I did it 'time and material. I was employed there you might say as foreman, I was to take (335) care of the men that was there. The pipe that held them up was the one going from the main steam line through the wall into the kitchen. I cut a hole in the place so that I could put the cabinets in. It was sometime in December that Mr. Gilbertson took him upstairs and showed him the soot, they were discussing it. It was after I finished my work. I wouldn't say whether it was before or after filing of this lawsuit.

On recross examination he testified, he was not interested in the outcome of the lawsuit.

Then plaintiffs moved as follows:

Mr. Bell. Comes now the plaintiff and moves to strike all of the evidence with relation to the soot or damage done to the building for two reasons: One, that it is not within the pleadings, and for the next reason that there has been no proof at all, whatsoever, of any warranty of this old second-hand burner that everyone knew was an old second-hand burner that was put in there for temporary use, and therefore, it was not guaranteed not to smoke; and it was evidently known that it was defective, or it wouldn't have been installed just for a temporary use until better burners could be obtained. Therefore, I move to strike all of this testimony as to the damage because it would not be binding on these plaintiffs, who didn't warrant this old burner not to smoke.

The Court. Motion denied.

Mr. Bell. Exception.

Then in rebuttal the plaintiffs called Hillary H. King who testified as follows:

That he is a steam fitter, has been for 18 years, has been foreman for various companies during that time, was foreman for Siems, Spokane and Drake in Kodiak for a year and a half, worked for Reed and Lane in Fairbanks, set the boiler in the place called The Ranch, is familiar with boilers, he set it to the best of his knowledge with the boiler that they had. There was no defects in the setting that he knows of; the boiler was a (336) used boiler and it would not be set like a new one. The foundation it sets on would be warped from the heat where it was previously used,

but that would not affect the boiler. It was a 26" boiler. It would be amply large to heat the building, it came out of the Alaska Airlines hangar at the airport. He set the boiler only, worked there for a few days erecting the boiler, helped transfer the boiler from the Reed and Lane Plumbing and Heating shop out to the Ranch with the assistance of the men that were under the employment of Mr. Gilbertson. They took it out there a section or two at a time, made two or three trips back and forth from the shop taking it out there. He cleaned it up and erected it inside the boiler room, cleaned it up and assembled it the way it should be, put headers on it and put pipe on that leading to the entrance of the building itself, *the work was in a first-class workmanship manner.* (Italics ours.)

On cross-examination by Mr. Clegg, he testified that he wasn't there after the boiler was fired up, never went back to work at it. Went back one time to get his overalls and jumper he had left there. Don't remember the date that he erected it. That it is the same boiler that is in dispute here that he set. The one he worked on. He worked for Siems-Drake Construction Company over at Kodiak as a steamfitter a year and a half, came from California. Siems-Drake Construction work at Kodiak, been in Fairbanks since August 1943 working for himself now, at 111 Noble Street, operates a cafe called the Diner, is the owner of it. Has not abandoned his trade of steamfitting, going back with Lytle and Green as foreman of steamfitters when they resume work this spring for the

Alaska Railroad, was employed by them last fall, also promised a job then, would have to make some other arrangements to take care of the Diner. Worked out at Alaska Airlines on the boiler for Reed and Lane. He said the boiler came from there and they took it from the Alaska Airlines down to their shop and then transferred it from there out to the Ranch. (337) The Court adjourned until ten o'clock a.m., Tuesday, February 5, 1946 at which time Joseph Lane was recalled and testified that he remembers Montgomery out at the place, he was a general handy man and did a little bit of everything. I had a talk with him the day I repaired the burner, he was there when the burner was repaired, that was the 24th day of December, 1944, as the tickets show.

Then the following questions were asked and answers given and the rulings of the Court were had:

Q. Now, in that conversation, what was said by you and what was said by Mr. Montgomery?

Mr. Clegg. We object to that as incompetent, irrelevant, and immaterial and not rebuttal.

The Court. There was no foundation laid for an impeachment either, was there?

Mr. Clegg. No, sir.

The Court. Objection sustained.

Mr. Bell. Exception.

Q. Mr. Lane, did you testify in chief as to what you did that day out there?

A. Yes.

Q. Now, did you talk to Mr. Montgomery and show him what you did?

A. Yes.

Mr. Clegg. We object to that as immaterial and irrelevant and not binding on the defendants.

The Court. Well it has been answered.

Q. Mr. Lane, in that conversation did he tell you that he had taken that electrode out two or three times and worked on it himself?

Mr. Clegg. We object to that, if the Court please, as no foundation has been laid for the question. It isn't rebuttal testimony, and it is not binding on the defendants. (338)

The Court. Objection sustained.

Mr. Bell. Exception. Your Honor, may I make an offer then? I offer to prove by this witness, if he was permitted to testify, that he had a conversation with Mr. Montgomery, who was a regular employee of the defendant in this action, and that in this conversation Mr. Montgomery told him that he had taken this electrode out and worked on it two or three times, and then when Mr. Lane examined it, it was broken—the electrode was broken—and that he repaired it; that he did not have a new electrode to substitute or replace this one, and he repaired it so that it worked good at the time and placed it back, and it worked all right at the time. I offer to prove that.

Mr. Clegg. To which we make the same objection as before.

The Court. Objection sustained, exception allowed plaintiff.

Q. Mr. Lane, you heard Mr. Gilbertson testify that there was plenty of burners in the Town of Fairbanks at that time. Is that true?

A. Not to my knowledge it isn't.

Q. Well, were you able to get any burner at that time other than what you furnished him.

A. No.

Q. Now did Mr. Gilbertson know that this was an old burner at the time you let him have it?

A. Yes.

Q. What was your conversation with Mr. Gilbertson with reference to taking out the new burner that was in the boiler, under the boiler, and placing in the old burner that was larger?

Mr. Clegg. Just a minute. We object to that as leading and suggestive, incompetent, irrelevant, and immaterial and not rebuttal.

The Court. Now is that rebuttal, Mr. Bell?

Mr. Bell. Mr. Gilbertson testified to what that conversation was, and this gentleman has a different version of what (339) the conversation was, and that he explained to him at the time that it was old and that he would let him have it, if it would work all right, until they could get another burner, and then, if they could get another burner, and then, if they could get a new burner as large as Mr. Gilbertson wanted anywhere, they would take it back, allowing him the same \$100.00 for it that they charged him for it.

The Court. Objection sustained.

Mr. Bell. Exception. I offer to prove at this time by this witness, if permitted to testify that when he talked to Gilbertson about taking out the new burner that it was working all right at the time, but Mr. Gilbertson thought it was consuming too much oil

because it burned too much of the time to keep the boiler hot and wanted a larger burner, and that this witness told Mr. Gilbertson at the time that he had an old burner that he could have for \$100.00 and he would take the new burner out and give him credit for the full \$250.00, the amount he had charged him for the new burner, and then if he could, if Mr. Gilbertson could get a larger burner, any better burner, that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the \$100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work.

Mr. Clegg. To which we object, if the Court please, upon all the grounds heretofore stated and especially on the ground that it isn't rebuttal testimony, and no foundation has been laid for this question, or series of questions.

The Court. Objection sustained, exception allowed plaintiff.

He then testified that he lent the people an oil burner space heater to use during the time the work was being done and charged them nothing for it because of the fact that material wasn't available at the time and hard to get so in order to keep him going until we were able to get his heating system in why we lent him this burner. Mr. Gilbertson had his own radiators; Reed (340) and Lane furnished unit heaters was all. They were taken from the depot here directly from the depot out to Gilbertson's ranch. They were not in the original bill as submitted to Mr. Gilbertson, they were overlooked, they were eventually

billed at \$195.00 for the two heaters that had been left out of the original bill to Mr. Gilbertson.

Then these questions were asked and these answers given and the rulings of the Court as follows:

Q. Mr. Lane, what was the occasion of your going out the ranch on the 24th of December, 1944?

Mr. Clegg. We object to that on the ground it is mere repetition. It has already been well covered by Mr. Reed.

The Court. Objection sustained.

Q. May I ask the question this way: Were you called by a member—were you called by Harvey Gilbertson or George Gilbertson to go out there that day?

Mr. Clegg. We object to that on the ground that it has been already answered, and it makes no difference which of the defendants did call the Reed and Lane shop.

The Court. Objection sustained.

Mr. Bell. Exception. You may take the witness.

Mr. Clegg. No questions.

Mr. Bell. We rest.

Mr. Clegg. If your Honor please, at this time we would like the privilege of reviewing our motion at the close of the main case of the plaintiffs for non-suit on the grounds stated at that time, and on the further ground that the testimony of the plaintiffs clearly show that the so-called lien statement, this lien statement in this case, was not filed in due time, and was filed after the expiration of ninety days from the

cessation of work and furnishing of materials as alleged in the complaint, and it is, therefore, void; and there is no basis whatsoever upon which a judgment for the plaintiffs might be given to establish this lien, or alleged lien.

The Court. Motion denied.

Thereafter, and on or about February 18th, 1946, the District Judge signed and caused to be filed, findings of fact and conclusions of law.

ARGUMENT AND CITATIONS.

For the purpose of brevity I will group here for argument assignments of error, numbers one, two and three, which are:

1. That the Court erred in sustaining the defendant's demurrer on May 4, 1945.

2. That the Court erred in sustaining the demurrer to the plaintiff's complaint on the 18th day of May, 1945.

3. That the Court erred in sustaining the demurrer to the plaintiff's amended complaint on May 25, 1945.

Our statutes affecting the kind of lien herein sued on are set out above. Section 1982 sets out quite clearly who are entitled to a lien, and unquestionably plaintiffs were entitled to a lien. There being no contention that the procedure to be followed for filing and establishing the lien was not complied with as proved in Section 1987 set out above.

Then if the complaint meets the requirements of the statutes, it was error to sustain the numerous demurrers.

The statute last referred to provides that the action to enforce the lien shall be brought before the District Court and the pleadings, process and practice and other proceedings shall be the same as in other cases and also provides that in all actions under this article the District Court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien and a reasonable amount as attorney's fees and that all persons interested in the matter, in controversy on the property to be charged with the lien, may be made parties. And that the proceedings upon the foreclosure of the liens created by this article shall be, as nearly as possible, made to conform to the proceedings of a foreclosure of a mortgage lien upon real property.

Our statutes do not make any specific requirement in foreclosure of mortgage cases except as provided in Chapter CIX and especially Sections 3897-3898 of the Compiled Laws of Alaska 1933, and there is nothing required other than the general rules of pleading.

With this in mind, I can not possibly conceive of anything justifying the Court in making the three above orders sustaining the demurrers when the original complaint contained everything that the amended complaint did except that in the amended

complaint the words were added in paragraph five "reasonable and customary." And in paragraph seven there was added the statement as follows "the sum herein sued for" and in paragraph nine, the words, "in the Territory of Alaska" were added. That to the original complaint there was attached an exact copy of the lien sued on and it was made a part of the complaint by reference. (See Par. 9, page 16.)

Plaintiffs alleged that the material furnished and labor performed was of the value of \$2107.24 on which the defendants were entitled to a credit of \$677.48 leaving a balance due these plaintiffs in the sum of \$1429.76. (See Par. 5 on page 4 of Transcript.)

The allegation of value naturally infers, reasonable value. If it was not reasonable it would not be of that value therefore when the word value is pleaded it carried with it the presumption it is reasonable. In support of this I call your attention to *Rowland v. City of Tyler*, 5 SW (2d) 756, Second Syl. reading:

"Value of property must be taxed under Const. Art. 8-1, means the reasonable cash market value thereof."

From the opinion on page 760 I quote:

"It is well established that the term 'value' as used in the constitution means the reasonable cash market value."

This case cites many others with approval.

Then in *Long v. Shirley*, 14 SE (2d) 375, from the Second Syl., I quote a part thereof which is:

“Since word ‘value’ found in the Statute includes actual or usable value as well as market value.”

It just seems a bit too technical to sustain a demurrer on such hair splitting cause and is not following the Statute which provides for liberal construction in favor of lien claimant.

Section 2093 of C. L. A. 1933 which calls for liberal construction of lien laws within this chapter, which is Chapter XXXIX including Mechanics’ Liens (Art. 1 of Chapter) while 2093 was a part of Chapter 113 of Session Laws 1933, which chapter did not include mechanics’ liens; yet article 1 of Chapter XXXIX of C. L. A. is derived from the mechanics’ lien law of Oregon whose courts have consistently held that the Oregon Statute was to be liberally construed in favor of the lienor. That construction was adopted as a part of the Oregon law; and therefore liberal construction applies to the mechanics’ lien law of Alaska, whether or not C. L. A. 1933, Section 2093 so applies.

The other reasons for sustaining the demurrer were that in paragraph 9 of the original complaint in the eighth line thereof there was omitted the words “in the Territory of Alaska” and in line 6 of paragraph 7 the words “the sum herein sued for” were omitted.

It is my contention that those words were unnecessary as the Notice of Contractors’ Lien was attached marked Exhibit “A” and made a part of the complaint and this Notice of Contractors’ Lien started off with the following words, “United States of

America, Territory of Alaska, Fourth Division, Fairbanks Precinct", and contained a correct description of the property to such an extent that there could never be a possible doubt as to the location of the property as there is only one Fairbanks Meridian in all Alaska.

It is plaintiffs-in-error's contention that neither of said demurrers should have been sustained and much delay was caused thereby and much time can be saved in time to come by a ruling on this question.

For further argument we will group here Specifications numbers IV, V, VI, VII, VIII, IX and X of those set forth in the Assignment of Errors commencing on page 46 of printed transcript and hereby make them a part hereof.

IV.

That the Court erred in excluding the charge tickets (225) the same being the original entries and part of the bookkeeping system of the Plaintiffs as shown as follows, to-wit: and Evidence set out in the Assignment of Error on pages 46-47-48 and 49.

V.

The Court erred in sustaining the objection of the Defendant to material, competent and relevant (228) evidence as follows, to-wit:

"Q. Mr. Lane, I mean, you have heard Mr. Clegg's statement about sending him a statement later that superseded all other statements. Who did that? Did you?

A. That is correct, yes.

Q. And is that statement based upon these particular bills as you and George corrected them that day?

Mr. Clegg. Just a moment. We object to that as irrelevant, incompetent, and immaterial and leading.

The Court. The objection will be sustained.

Mr. Bell. Exception."

VI.

The Court erred in sustaining the objection to competent, relevant and material evidence, as follows, to-wit:

"Q. What was that statement based upon, the corrected statement that was mailed to him? What was that based upon?

A. That was based upon the adjustments that Mr. Gilbertson and I made on the time cards and on the invoices.

Q. And are these the invoices that are marked Plaintiff's Identification No. 1?

A. Those are the time cards there, yes, sir.

Q. Those are the ones that were before you and Mr. Gilbertson, the ones the adjustments were made on?

A. That's right.

Mr. Bell. I again offer these.

Mr. Clegg. We make the same objection as heretofore without repeating it. (229)

The Court. I don't think these are admissible anyway, unless they form a part of the regular bookkeeping system, and in that case the first record which takes in all of the items is the correct one to introduce.

Mr. Bell. All right, your Honor, but I thought he would (did) testify they were the first entries, the original entries, in their bookkeeping system. (94.)

The Court. Yes, but each one is a separate entry. ('Statement This Cancels and Supersedes All Previous Billings' dated February 19, 1945, was marked Plaintiffs' Identification 2 by the Clerk of the court.)

Q. Mr. Lane, I hand you a statement that has been marked Plaintiffs' Identification No. 2 and will ask you to state if that is an exact copy of the statement Mr. Clegg referred to as being mailed or being given to the defendant in this case * * * the defendants?

A. Yes, that is the amended statement.

Q. Now, is that in the same condition outside of a few pencil marks along the edge, as it was at the time you made the original?

A. Yes.

Mr. Bell. Mr. Clegg, do you object to me erasing some of my own notations on the side?

Mr. Clegg. Well, they might as well stay there if you say you made them.

Mr. Bell. I put them there * * * for the record. I now offer it in evidence.

Mr. Clegg. We object to it on the grounds that no contract or agreement has been established as alleged in the complaint, and this, therefore, is (230) incompetent, irrelevant and immaterial. There is no testimony here showing there was any agreement reached as to what the terms of this alleged contract were, or what was supposed to be done by the plaintiffs in performance of the contract, or what the terms of the contract were.

The Court. The objection will be sustained, exception allowed.”

VII.

The Court erred in sustaining the objection to competent, material and relevant evidence as follows, to-wit:

“Mr. Bell. Your Honor, he admits that the last material was furnished specifically in his pleadings on the 23rd day of December in paragraph 2. In paragraph two of his answer he admits that it was that day, and the evidence shows that there was material furnished on the 23rd and the 24th both. Mr. Reed showed some little thing on the 24th even, but the 23rd was the last matter that was stressed, except some small matter on the 24th, but he admits it was furnished on the 23rd, and that, of course, puts it within the period.

Mr. Clegg. If your Honor please, I would like to add a few words in explanation of that and in contradiction of it. It is true, as Mr. Bell states, that the plaintiffs having alleged that the work ceased on the 24th day of December, we admit it. We admit it clearly under mistake and misapprehension and misinformation with reference to the proof. Now they put a witness upon the (231) stand here, and he introduces the absolute records kept by the Plaintiffs in this case which shows conclusively and the testimony of the witness, in addition, shows conclusively that there was a hiatus between the 15th and 16th day of December up until the 23rd or 24th day of December, which can't be shown except by their own records, and we assumed, of, course, that when a matter of that kind is placed in a pleading that

it states the truth. Therefore, without wishing to call for an explanation of the books, or, showing of the books of the plaintiffs, the defendants erroneously admit the allegation in the complaint, that the work terminated and the materials ceased to be furnished to this property on the 23rd day of December; but we have now, your Honor, the exact testimony of the people who were supposed to know and who have kept a record of it, and by their own testimony and by their records, they show that at the time this alleged lien was filed that it was outlawed, and we certainly are not to be prohibited by insisting upon a substantial matter of that kind by an erroneous admission. It is clearly erroneous. It isn't the truth, and that is what we are here for—to ascertain what the truth is, so we ask the court to allow us to amend the answer, if necessary, in that regard, and, instead of admitting that the work ceased, let us stand upon the proposition shown by their own evidence here that the work had ceased long prior to the actual time and legal time fixed by the statute for the filing of this lien. (232)

The Court. You wish to amend that part of your answer, do you?

Mr. Clegg. Yes, sir, and show that we *deny that it was filed on the 23rd or the 24th* and insert in place of it the date shown by their own records—that it ended and terminated on the 16th day of December instead of the 23rd or the 24th, whichever the pleadings show. (Italics ours.)

Mr. Bell. I object to the amendment.

The Court. It may be amended to conform to the evidence.

Mr. Bell. Your Honor, the evidence—I want to call your attention to that—the tickets show that work was done on the 24th and he testified to it.

Mr. Clegg. Your Honor, he said he got a service call by telephone to come out there and look at it, and they went out there and charged for one hour's time. That had nothing to do with the original agreement, nothing whatever.

Mr. Bell. He went out there and did the work on the 24th. He went out and fixed something that wasn't working.

The Court. That would be just a repair job. That wouldn't be part of the original contract.

Mr. Bell. The other was within the time, the 23rd is within the time, the material and work furnished on the 23rd.

The Court. The only other, as I recall it, was something on the 20th, the 16th, and the 20th is the very last. (233)

Mr. Bell. Just wait a minute. Let me look at those cards as to dates—here is one for the 27th.

The Court. There was no evidence about it.

Mr. Bell. I offered this, though, in evidence.

The Court. It doesn't make any difference, though. It wasn't received.

Mr. Bell. Now, your Honor, may I reopen my case just to offer these particular cards?

The Court. I will permit you to reopen your case.

Joseph Lane, a witness on behalf of the plaintiffs, having been already duly sworn, on oath testified on further direct examination by Mr. Bell as follows, to-wit:

Q. I hand you a ticket, which seems to be an invoice marked Plaintiffs' Identification No. 1 in this case, and I will ask you to state if you know who made the call or did the work on that?

A. I did the work.

Mr. Clegg. Just a minute. We object to this your Honor, as supplementary to the *prima facie* case made by the Plaintiffs and serves to contradict their own testimony and is not permissible as rebuttal evidence, because there is no foundation laid for it, and otherwise, it is irrelevant, incompetent and immaterial.

The Court. No foundation has been laid for the use of any such memorandum yet.

Q. Well, is this an original, a part of the original records in your office?

A. Yes.

Q. Is that a part of the bookkeeping, general bookkeeping system of your office?

A. Yes.

Q. Now, when, and under what circumstances are (234) cards like that made?

A. They are made by the man, whoever did the work, at the time the work was done.

Q. And who did the work on the date indicated at the top of this time card?

A. I did it.

Q. Did you date it?

A. Yes, I dated it.

Q. Is it in your handwriting?

A. Yes.

Q. Now, then, did you at that time go upon the premises of the defendant at the Ranch and do work there?

A. Yes.

Mr. Bell. Now, I offer this in evidence.

Mr. Clegg. Just a minute, your Honor. Well, that is the same thing that was introduced here by Mr. Reed: call on burner, labor, one hour, service; it says 'service' and it is dated 12/24/44. That is the very identical thing Mr. Reed was talking about. We ask that it be excluded, your Honor, and disregarded entirely on the ground that it is incompetent, irrelevant and immaterial and has already been testified to by a witness on direct examination, by Mr. Reed on direct examination and cross-examination.

The Court. Objection sustained, exception allowed Plaintiff."

VIII.

The Court erred in sustaining objection to Plaintiff's evidence that was competent, relevant and material as follows, to-wit:

"Q. Mr. Lane, what was the occasion for your going out to the Ranch on the 24th day of December, 1944?

A. I was called out there because they were having trouble with (235) the oil burner.

Q. Is that the oil burner you had put in?

A. That's right.

Q. Was that a part of the regular contract work that you had done for them?

A. Well, ordinarily a service call, a service charge, wouldn't have been made there, but, due to the fact that they had taken that burner out themselves and worked on it themselves a few times, we made a service charge on that account, and it was part of the original work.

Q. And did you do the work after you got out there?

A. I did, yes.

Q. Have you ever been paid for this work?

A. No.

Q. And this is included in the work that you and George Gilbertson talked over at the time you were going over these tickets?

A. That's right.

Mr. Clegg. We object to that as irrelevant and immaterial.

The Court. Objection sustained, exception allowed Plaintiff."

IX.

The Court erred in sustaining Defendants' objection to material, competent, and relevant evidence offered on the part of the Plaintiffs as follows, to-wit:

"Q. Was this ticket present when you and Mr. Gilbertson, George Gilbertson, were going over the charges and the dispute between you as to the charges and the labor done out there?

A. Yes, it was there with the other time cards.

Q. Was it one of the cards that was agreed upon by you and Mr. Gilbertson at that time?

Mr. Clegg. I object to that as incompetent, irrelevant, and immaterial, not proper direct examination at this time, and it is outside of the issues.

The Court. I think it is also incompetent. I will sustain the objection. Exception allowed Plaintiff."

X.

The Court erred in sustaining the defendants' objection to competent, relevant and material evidence, as follows, to-wit:

“Q. You did work on the 24th day of December, 1944, for the defendants in this case?

A. Yes.

Q. And that was the occasion for making this particular charge?

A. Yes.

Mr. Bell. We re-offer the card in evidence.

Mr. Clegg. We object to it on all the grounds already stated, your Honor, and that it is not proper rebuttal evidence, and that there is no foundation laid for its introduction. It has already been testified to by one of the witnesses on the case in chief. It is incompetent, irrelevant and immaterial.

The Court. Objection sustained, exception allowed Plaintiff.

Mr. Bell. Your Honor, may I say this, please: It is not rebuttal evidence. You allowed me to re-open my case in chief, and this is evidence after you have permitted an amendment in your answer.

The Court. I am not ruling on it on the ground that it is rebuttal. I ruled on it on the other grounds, exception allowed Plaintiff.” (237)

The plaintiffs produced each and every time card, plaintiffs both testified as to their system of book-keeping and that each of these cards were made at the time the work was done by the person doing it and each were identified by the man making it and on each occasion the man making the time card testified that it was correct, that the time was actually put in; that the charge was correct; that the card was a part of their regular bookkeeping system; that it

was an original and first entry; that the cards were each in the same condition as they were when made and were made in the regular course of plaintiffs' business. The exhibits are now before this Appellate Court (thanks for an order of this Court requiring that they be sent here) show for themselves to be clean, clear and unambiguous with no mutilations or damage thereto and are as originally made.

After those time cards and invoices were fully identified they were offered at various stages of the trial and even after the witness Lane had testified that the original time cards and invoices were before Mr. George Gilbertson and himself and each item and charge was examined by the two of them and certain corrections made, on a few of the invoices and where then by them considered correct and then since George Gilbertson had failed to deny this and in the main had admitted it, they were again offered in evidence and an objection was sustained to their admission.

Then the particular ticket dated December 24, 1944, was offered separately and the Court sustained the objection to it. After Mr. Lane had identified it as having been made by him on the day the work was done and testified that it was the original entry, was a part of their regular bookkeeping system, made in due course of business, was correct in every way, that he had done the work in pursuance of a call from the defendants and the charge made therefor was the regular and customary charge made for that kind of services at Fairbanks, Alaska, at that time.

In *Jones on Evidence*, Vol. 2, at page 1083, you find this statement:

“However admissible entries are not confined to mercantile transactions; they may relate to the accounts of persons generally, where goods, services or materials have been furnished. It makes little difference in what capacity services have been rendered, provided they have been performed in the regular course of business.”

and I quote from page 1078 of the same book:

“Although books are admittedly more satisfactory where it appears that they have been kept in the form of daily entries of debit and credits in a day book or journal, this is not essential. They may have been kept in the form of a ledger, if this is the general mode in which the party keeps his books—provided that the entries are original entries. The book may take the form of a Time Book evidencing not only the labor of the plaintiff but that of his apprentice or assistant as well.
* * *”

The controlling federal statute on the subject is as follows, Par. 695 of U.S.C.A. 28, found in *Cumulative Annual Pocket Pact 1945*, reads as follows:

Writings and Records Made in Regular Course of Business.

695. Admissibility.

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or

event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "Business" shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640, par. 1, 49 Stat. 1561.)

This section has been construed by the Appellate Courts many times but we will quote from only a few:

From *Hoffman v. Palmer et al.*, 129 Fed. (2d) at page 976, the 7th Syl. is:

In federal statute rendering admissible any record made in regular course of any business, if it was regular course of such business to make such record, the words "regular course of business" are not colloquial words, but are words of art, and should be given their judicially settled meaning in absence of a contrary legislative intention clearly expressed in the statute or its legislative history. 28 U.S.C.A. Par. 695.

Then in *Harper v. United States*, 143 Fed. (2d) 795, from page 806 we quote:

(26-28) The purpose and effect of this statute is to make admissible any writing if made in the

regular course of any business without the strict proof of authenticity, which had theretofore been required. *Palmer v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A.L.R. 719.

Then we quote from *Ulm v. Moore-McCormack Lines, Inc.*, 115 Fed. (2d) 492. The 5th Syl. thereof reads as follows:

5. Evidence Key 376(6), 377

The objective of statute providing for admissibility as evidence in any court of the United States of a memorandum or record of any act, transaction, occurrence, or event made in regular course of business was to do away with technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers. 28 U.S.C.A. Par. 695.

From the body of the opinion we quote:

(5) Plaintiff asserts that, since this act is similar to the New York statute of 1928, Civil Practice Act, Par. 374a, it must have been copied therefrom and should receive the similar restrictive interpretation which that statute has received, citing particularly *Johnson v. Lutz*, 253 N. Y. 124, 170 N. E. 517, and *Geroeami v. Fancy F. & P. Corp.*, 249 App. Div. 221, 291 N. Y. S. 837. But this act did not come from the New York statute. Both in fact derived from the activities of a committee of experts on the law of evidence appointed by the Commonwealth Fund of New York, who, in 1927, published a model act for "Proof of Business Transactions." *Morgan and Others, The Law of Evidence: Some Proposals for Its Reform*, c. V, p. 63. See 5 *Wigmore on Evidence* (3rd Ed. 1940) Par. 1520.

The objective, as Wigmore so lucidly explains, was to do away with the technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers.

The Commonwealth Fund's proposal became the model for the New York, the federal, and some half dozen state statutes, and has led to further like proposals which seem to have met with the universal approval of those interested in law reform. Thus, the National Conference of Commissioners on Uniform State Laws has recommended for general adoption a Uniform Business Records as Evidence Act, along similar lines, which has already been enacted in several states. A like proposal appears in Barrow, *Business Entries Before the Court*, 32 Ill. L. Rev. 334. All these proposals were approved and recommended by a distinguished committee of the American Bar Association's Section on Judicial Administration, supported by an advisory group of 44, in a report in 1938 which was approved by the section and by the House of Delegates of the Association. 24 A.B.A.J. 726, 751, 752; 63 A.B.A. Rep. 525, 682; 5 Wigmore on Evidence Par. 1520. The restrictive interpretation of the statutes embodying this new reform in New York and elsewhere has been the subject of caustic comment by Dean Wigmore on "the perverse stolidity of the juristic mind." Ibid Par. 1520. He holds the particular decisions relied on by plaintiff to be contrary to the express words of the statute. Ibid. Par. 1530a; cf. also *Roge v. Valentine*, 255 App. Div. 475, 7 N. Y. S. 2d 958, which he cites as "another instance of judicial statification."

In *Hunter v. Derby Foods, Inc.*, 2 Cir., 110 F. 2d 970, 973, we supported a broad interpretation of this statute justifying the admission of a coroner's certificate embodying an opinion or conclusion as to ground or cause of death of a deceased, even though the New York precedent might cast doubt on this conclusion. Compare *Johnson v. Lutz*, supra; *Beglin v. Metropolitan Life Ins. Co.*, 173 N. Y. 374, 66 N. E. 102; *Flynn v. Metropolitan Life Ins. Co.*, 252 App. Div. 78, 297 N. Y. S. 349; but see *Scott v. Empire State Degree of Honor*, 204 App. Div. 530, 198 N. Y. S. 535. But whatever should be the judicial attitude toward this statute, we do not think the cited New York cases are in point on the immediate issue here. They did not involve the problem of identification, but only whether or not opinion statements of a doctor and of a policeman contained in official or business records were admissible. Here the records were claimed primarily to show direct observations made by attending physicians, not entries of opinions.

There are many State Court decisions in point and I believe the old case of *Patrick v. Tetzlaff*, found in 189 Pacific at page 115, is about as near in point with the facts here as any of the cases we have been able to find. From this case I quote Syl. 1 and 2 as follows:

1. Evidence Key 376(6) — Oath that original books regularly kept are correct not required.

Where the original character of the books of a tradesman or shopkeeper is proved, and it is shown that they have been regularly kept follow-

ing the usual course of business of the person producing them, an affirmative oath on the part of the tradesman or shopkeeper keeping them that they are absolutely correct is not required to render them admissible in evidence and prima facie proof of the items disclosed thereby.

2. Evidence Key 355(1), 383(7) — Cards on which workmen entered time and from which account was made up constituted prima facie proof.

Where under the system employed in a repair shop workmen entered the time they were employed on particular jobs on cards over their signatures, and the bookkeeper made up the total charge from such cards, *the cards constituted original memoranda of the items of the account for the amount of labor performed and were prima facie proof thereof.* (Italics ours.)

From the body of the opinion we quote:

It would be to impose a most difficult rule upon the commercial world to hold that, notwithstanding ample proof as to the original character and regularity of the keeping of accounts, there must be in addition an affirmative oath on the part of the tradesman or shopkeeper producing them that they are absolutely correct. In large establishments employing a great multitude of clerks this proof would be in many cases beyond reach. We think that the cards offered in evidence constituted original memoranda of the items of the account for the amount of the labor performed, and that they were prima facie proof of the fact. *White v. Whitney*, 82 Cal. 166, 22 Pac. 1138; *Carroll v. Storck*, 57 Cal. 366.

Other State Court cases in point are:

Pacific Mutual Life Ins. Co. of Cal. v. O'Neil,
130 Pac. 270;

Clayton Coal Co. v. King et al., 113 Pac. (2d)
672;

G. S. Wood Mercantile Co. Reinc. v. Dougall,
114 Pac. (2d) 202;

School District No. 1, Apache County v. Whit-
ing, 107 Pac. (2d) 1075.

Permit us to quote from a well recognized authority,
Nichols Applied Evidence, Vol. 1, 799, par. 42:

Par. 42.—Cards as original entries. Where under the system employed in a repair shop workmen entered the time they were employed on particular jobs on cards over their signatures, and the bookkeeper made up the total charge from such cards, the cards constituted original memoranda of the items of the account for the amount of labor performed and were prima facie proof thereof.

It is our contention that the Court erred in its rulings as above set forth.

I will group for argument specifications of error set out in the assignments of error, pages 60, 61 and 62 which are specification numbers XIII, XIV and XV, which are as follows, to-wit:

Specification Number XIII.

The Court erred in denying plaintiff's motion to strike as follows, to-wit:

Mr. Bell. I move to strike all of his testimony about the boiler not working, the burner not working, and the sooting of the place, for the reason that it is outside of the issues, and there is no dispute, there is no contention that it was a contract to do anything except furnish some labor and material; and this is not defensive matter, because if they had made a contract to do some particular thing for a certain amount, it would be an implied warranty that it would work, but there is no testimony of any implied warranty, and I move to strike that part of the answers.

The Court. Motion denied.

Mr. Bell. Exception. (239)

Specification Number XIV.

The Court erred in overruling plaintiff's objection to incompetent, irrelevant and immaterial and prejudicial testimony as follows, to-wit:

Q. How did that dirt and soot originate? What was the cause of that?

A. I really don't know, only when it would shut down and then start up, it would just blow off the doors, or open, rather, and then just a lot of soot would come out all over.

Q. Was your interior perceptibly hurt?

A. Yes.

Mr. Bell. I object to that as incompetent, irrelevant and immaterial and not within the pleadings.

Q. Just generally speaking.

The Court. Objection overruled.

Mr. Bell. Exception.

Specification Number XV.

The Court erred in overruling plaintiff's motion to strike all of the evidence with relation to soot or damage as follows, to-wit:

Mr. Bell. Comes now the plaintiff and moves to strike all of the evidence with relation to the soot or damage done to the building for two reasons: One, that it is not within the pleadings, and for the next reason that there has been no proof at all, whatsoever, of any warranty of this old second-hand burner that everyone knew was an old, second-hand burner that was put in there for a temporary use, and therefore, it was not guaranteed not to smoke; and it was evidently known that it was defective, or it wouldn't have been installed just for a temporary use until (240) better burners could be obtained. Therefore, I move to strike all of this testimony as to the damage because it would not be binding on these plaintiffs, who didn't warrant this old burner not to smoke. (And all of this testimony went in over the objections of the plaintiffs.)

The Court. Motion denied.

Mr. Bell. Exception.

This is so apparent and based upon elementary law that citations thereon to the Court would not be necessary and we presume not appreciated. It is an elementary principle of law that a person furnishing labor to do and act under the supervision of the person for whom the work is being done, does not warrant that the production, when finished, will be fit for the purpose for which it is being constructed. That responsibility rests upon the supervisor and in

our case the supervisor was furnished by the defendants and the plaintiffs were specifically told that no supervision would be expected or paid for and to supplement this position we call your attention that there never was a contract either oral or in writing to do any specific and definite thing. The only contract was to furnish certain articles of material and to do certain labor. All of this to be furnished and done at the instance and request and under the general supervision of George Gilbertson, the principal defendant. There isn't a scintilla of evidence anywhere that the defendants ever represented any of the materials furnished as being fit and proper for the use and desire of the defendants, who were in equally as good a position to know what they wanted as were the plaintiffs and since the defendants specifically directed the plaintiffs that they wanted no supervision, and would not pay therefor, it would be a severe stretch of imagination and a misinterpretation of the law of warranty to hold that the plaintiffs warranted this old second-hand burner not to smoke or soot up the place, and to strengthen this position there is no cross-petition or counter-claim in the answer of the defendants and none would have been proper under the peculiar statutes of Alaska and the rulings of that particular Court, to-wit: The Fourth Judicial Division, in which it has continuously held that an action in damage being a jury case and an action in equity being a non-jury case; that the two could not be combined for any purpose and have repeatedly so held. That a counter-claim or offset

based on law could not be pleaded as a defense to an action in equity and therefore it is the natural presumption of the plaintiffs that that is the reason that the defendants here did not plead in their answer a cross-petition or counter-claim for damages. Therefore, any evidence introduced along that line was incompetent for several reasons and especially for the following reasons:

a. That there is no pleading to justify its introduction.

b. That due to the peculiar rules of this particular Court it could not have been pleaded as a counter-claim, offset or defense.

c. Such a pleading would of necessity be, either an affirmative defense, pleaded, specifically, as an affirmative defense, or it would have to be set off as a counter-claim or offset and none of these things were done.

d. There was no contract to do anything except furnish some labor and material and therefore there was no implied warranty that this old burner would not smoke, especially in view of the fact that all the parties testified that they knew that this was an old defective burner and Joseph Lane testified that he informed George Gilbertson that it was defective, and this was never denied.

And coupled with this is the evidence of the defendants and their employees, others than the plaintiffs having worked on this burner at various times and on one occasion Joseph Lane found the electrode

broken. Therefore, the motions to strike set forth in specifications of error Nos. 13 and 15 and the objection to the introduction of testimony as set out in specification of error No. 14 should have been sustained by the trial Court, said contention being reasonable, proper and just under the law, and the rulings thereon were error.

We will group here for argument specifications of error Nos. 16 and 17.

Specification Number XVI.

The Court erred in sustaining the defendants' objection to the plaintiffs' offer to prove as follows, to-wit:

Mr. Bell. Exception. Your Honor, may I make an offer then? I offer to prove by this witness, if he was permitted to testify, that he had a conversation with Mr. Montgomery, who was a regular employee of the defendants in this action, and that in this conversation Mr. Montgomery told him that he had taken this electrode out and worked on it two or three times and that when Mr. Lane examined it, it was broken—the electrode was broken—and that he repaired it; that he did not have a new electrode to substitute or replace this one, and he repaired it so that it worked good at the time and placed it back, and it worked all right at the time. I offer to prove that.

Mr. Clegg. To which we make the same objection as before.

The Court. Objection sustained, exception allowed plaintiff.

Specification Number XVII.

The Court erred in refusing the plaintiffs' offer to prove as follows, to-wit:

Mr. Bell. Exception. I offer to prove at this time (241) by this witness, if permitted to testify, that when he talked to Gilbertson about taking out the new burner that it was working all right at the time, but Mr. Gilbertson thought it was consuming too much oil because it burned too much of the time to keep the boiler hot and wanted a larger burner, and that this witness told Mr. Gilbertson at the time that he had an old burner that he could have for \$100.00, and he would take the new burner, and then if he could if Mr. Gilbertson could get a larger burner, any better burner, that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the \$100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work.

Mr. Clegg. To which we object, if the court please, upon the grounds heretofore stated and especially on the ground that it isn't rebuttal testimony, and no foundation has been laid for this question, or series of questions.

The Court. Objection sustained, exception allowed plaintiff.

These specifications of error set out above speak for themselves. The plaintiffs in error endeavored to prove the facts set out in each of these offers by competent questions and objections thereto were sustained by the Court. They were each competent and proof of these facts should have been permitted and there-

fore we will ask the Court to consider them as having been proven as the rules of this Court permit. Assuming that the Court considers this competent evidence in this hearing then it is clear that Mr. Montgomery, who was a regular employee of the defendants in this action, had taken the electrode out and worked on it two or three times and had broken it and then on the 24th day of December, 1944, Mr. Lane was called there to repair this burner and found the electrode broken and a new electrode not being obtainable, he repaired it so it worked good at the time and placed it back.

And it will be assumed that the Court will consider the offer in specification of error No. 17 to the effect that Lane talked to George about taking out the new burner that was working all right at the time and that George thought that it was consuming too much oil because it burned too much of the time to keep the boiler hot and he, George, wanted a larger burner and that Lane told Gilbertson that he had an old burner that he could have for \$100.00 and would take the new burner out and give him credit for the full \$250.00, being the full amount charged for the new burner, and if Mr. Gilbertson could get a larger burner or any better burner that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the \$100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work. This never has been disputed by the defendants and all of the testimony that has gone in along this line has sustained practi-

cally every word of the offer; therefore, the new burner furnished by Reed and Lane, that was working, was removed at the instance and request of Gilbertson because he thought it was consuming too much oil, because it burned too much of the time to keep the boiler hot.

Could it be said that there was any contract either direct or inferred that the plaintiffs would warrant this old burner to be fit and proper for the purpose, that George Gilbertson wanted it for? On the contrary, George Gilbertson was a steamfitter with authority to select the equipment that he wanted and presumably with the ability to make the selection wisely. And it could not be said that the plaintiffs ever warranted this old burner, but on the contrary placed it there at the instance and request of George Gilbertson after warning him of its defectiveness and to be used only as a temporary setup, and then the defendants, through their own fault by failing to pay the plaintiffs for the work and material furnished, brought about a lawsuit by which the plaintiffs attempted to collect for their labor and material furnished and the defendants had the use of the temporary setup for approximately a year.

The greater share of the equipment being admittedly satisfactory for temporary use and the only part of the equipment that was defective, if we take the defendants' own statements for it, was this burner for which they were charged \$100.00, therefore the offer to prove should have been accepted, the evidence was proper under the condition of the record at the

time the offer was made. We contend that the Court erred in denying the offer.

At the close of the testimony the trial judge took the case under advisement and then some time later during the month of February, 1946, he entered a findings of fact and conclusions of law which are set out in the transcript commencing at page 26. Then a motion for new trial and an amended motion for new trial were filed and overruled by the Court. (Tr. pp. 31 to 39.) Which motions for new trial are made a part of this argument, which is based upon assignments of error Nos. XVIII and XIX, which assignments of error are directed at the errors made by the Court in the findings of fact and conclusions of law which will be hereinafter pointed out to the Court under subdivisions of this group of assignments of error.

A.

First the Court made a finding that: "Between the 16th day of August, 1944, and the 20th day of December, 1944, inclusive, plaintiffs and defendants, George Gilbertson and Harvey Gilbertson, entered into an oral agreement whereby plaintiffs agreed to furnish *an adequate first class heating system* for the building of said defendants, known as The Ranch, upon the land described in the amended complaint herein and to install the same in said building and that said defendants agreed to pay therefor the reasonable and customary value of the same." (Tr. p. 27.)

There is positively no evidence whatsoever to cause the trial Court to arrive at this finding of fact. There is not a word of evidence that the plaintiffs ever "agreed to furnish an adequate first class heating system" but each and every part of the evidence is either silent on this question or absolutely to the contrary. The evidence clearly shows that during the summer and fall of 1944 that heating equipment was so scarce in Alaska that second-hand equipment was picked up wherever it could be and this is sustained by the testimony of both the plaintiffs and defendants. George Gilbertson testified that they had a second-hand boiler that they had gotten from a fire somewhere; also some radiators and other equipment. Mr. Lane testified that he recommended a hot water system and the principal defendant, George Gilbertson, testified he was a steamfitter of experience. They agreed on the hot water system when the water could be removed from the basement. There is a clear inference from the testimony that the basement could not be dried out and a lean-to building was constructed by the defendants. Then a hot water system was not then practical and a steam system was put in instead. The testimony shows clearly that George Gilbertson examined this second-hand boiler and sent his own men after it and agreed upon the price to pay for the boiler before it was ever used or taken by him. The evidence shows conclusively that oil burners were hard to get and that the plaintiffs succeeded in getting four of the same size from Seattle, Washington. That one of these burners was sold to

the defendants for \$250.00. The testimony stands undisputed that a good man, Hillary H. Kling, a steamfitter of eighteen years' experience, a former foreman for Siems, Spokane and Drake of Kodiak, installed that boiler, that the boiler would be amply large to heat the building. It came out of the Alaska Airlines hangar. That he cleaned it up and assembled it the way it should be assembled. That the work was in first class workmanship manner and no competent person ever testified or even insinuated that this was not true. Mr. Lane testified that the boiler was set correctly. He testified to years of experience in that line and no one ever disputed this. That he recommended a hot water job because it was more economical to operate. This couldn't be done until the basement was dried out. That Mr. George Gilbertson wanted unit heaters and that he later talked it over with Mr. Gilbertson and a hot water job could not be put in the lean-to. That there was nothing said about supervision to start with but later Mr. George Gilbertson specifically told him he wanted no supervision. Mr. Gilbertson being a steamfitter himself, plaintiffs never charged for supervision. That the defendants did some of the work themselves. That the plaintiffs sent men there to do the work as Mr. Gilbertson wanted it done. That he told Mr. Gilbertson that the charges would be \$3.00 per hour and Mr. Gilbertson said go ahead with it. That he did the work in compliance with Mr. Gilbertson's request. That the material listed in the identification was actually used and went into the building. That he and

George Gilbertson went over the list, piece by piece, went over the entire building there, went over the hours of labor, in the conference, made a few corrections therein. That the labor record kept by Mr. Gilbertson did not quite tally with his labor record. That he made a concession to Mr. Gilbertson thereon, which concessions are shown in the statement. (Transcript pp. 98 and 99.) He testified further that the new burner worked correctly and produced the necessary heat but that it ran more of the time than George thought it should and George thought it was using too much oil and that *George* wanted a larger burner. He testified that no other burners were available except an old second-hand burner. That he understood that the defendants were going to take the boiler out later and put it in the basement. The first burner put in was new and bought from LaPere & Walker. Plaintiffs bought four of them; oil burners were hard to get at the time. It was there for a week or two. It was taken out at the request of Mr. Gilbertson, who said it was too small; however, it was doing the work at the time. It ran a good time without shutting off and that is why he (Mr. Gilbertson) decided it was too small and he wanted it out of there.

Mr. Gilbertson and Mr. Lane made a deal on the old burner. Mr. Lane testified, "I told him at the time that the burner was an old one and that it was the only burner that was available. If he wanted the burner changed and if he wanted this old one that was in poor shape I would put it in and, at such time as he or I could get ahold of another burner, I would

allow him the price of the burner back, and that was satisfactory, the \$100.00 with return guaranteed; and when we put another burner in there he was to return that burner and get \$100.00 back." (Tr. pp. 110 and 111.)

Mr. Gilbertson told me to put the old burner in. I told him that the burner was too old and would never do the work. (Tr. p. 111.) That it was the only burner available at that time. We put it in at his instructions. He was the one who wanted it and that after the work was finished and a short time before the lien was filed, he and George Gilbertson went over the bill together and agreed thereon.

George Gilbertson, the principal defendant, testified that he became acquainted with the plaintiffs about the time he hired them to put the plumbing and heating in. We had the job and we wanted to get done so we hired Lane and Reed and they agreed to put the job in.

That he had a boiler out there and some radiators and fittings that we had bought down at a place that had burned up. (Tr. p. 137.) I told him we wanted a heating plant, we wanted a good plant in there, a plant that would keep it warm. * * * It couldn't keep the place warm. It was put in by Lane and Reed. They put a new oil burner in to start with. He was supposed to put in an outfit that would work. (This was purely a conclusion and not competent evidence.) It didn't work. We paid part of it at the time and a little here and a little there when they needed some money. * * * I understood there was a heating plant

to be put in there. So far as I know, when it was through and finished, and if it was a good job I would pay for it. (Tr. pp. 138 and 139.) This is not evidence of a contract or agreement but his own conclusion and not competent as evidence.

That he, George Gilbertson, was a steamfitter in good standing. Then this question was asked:

Q. It did keep the boiler hot when it did run practically steadily, didn't it?

A. Well, yes and no.

He then testified that he understood that the big burner was an old burner. Then this question was asked:

Q. When it was working, it heated the boiler adequately, didn't it?

A. *When it did work, yes.* (Italics ours.)

Then this question was asked:

Q. Now when you hired them to do the work out there, it was—they didn't make a contract to furnish you any particular thing or to do any particular thing? You hired them to go out there and work at so much an hour and furnish certain materials?

A. He had us charged up, to start with, on supervision, and we had that cut off. * * *

Q. What did you tell Mr. Lane about supervision?

A. I called him up. He was giving us, just like the Walker Construction Company gave us, a little run-around out there. They agreed to do a job for \$1000.00 and we ended up paying \$1700.00. I told him, "Don't go pulling a Walker Construction trick on us, because we won't agree to it."

Q. Then did you explain to him what you meant? Did you talk to him about supervision?

A. He tore those cards up; I believe he did, because he never charged us out with it after that.

Q. Mr. Gilbertson, you told him you didn't want to be charged any more with supervision?

A. We didn't feel like paying three and a half an hour for supervision.

Harvey Gilbertson testified that the plaintiffs were to put in a heating plant. We had to have a heating plant and went to them about it; they said they would put one in; they did it, but it never did work. (This is jut a conclusion and not evidence. There is no showing that Harvey was competent to judge.) They put in a boiler and an oil burner to heat it and some radiators and pipes. We already had those but some of them I guess they furnished, those that were shipped up here. (Tr. p. 163.) That they used the heating plant a little less than a year and put in another one, a hot water job.

Now this is all of the testimony that I am able to find that would in the slightest degree lend support to the findings of fact above set forth and there is not a scintilla of evidence anywhere to the effect that the plaintiffs agreed to furnish an adequate first class heating system for the building of the defendants, known as The Ranch, but there is plenty of evidence to the effect that there was no such an agreement and the finding of fact is directly contrary to the evidence and is without support therein.

Subject to the approval of the Court I would like to cite the law and decisions following all of the subdivisions and not repeat it at the close of each, for the sake of brevity, and therefore will set out the law that we rely upon following the other subdivisions of this group.

B.

The trial Court erred in the second finding of fact, to-wit: "Plaintiffs installed an alleged heating system in said building; that the same was not adequate to heat said building and was not a first class job but, in fact, was not of any reasonable value whatsoever, except the two unit radiators which were of the reasonable value of \$195.00." This finding of fact is error and there is nothing in the pleadings in the case to justify the introduction of any evidence and no evidence was introduced that would in any way sustain this finding of fact. The only allegation in the answer that could be argued as justifying such a finding of fact would be that found in paragraph 4 of the answer, which reads: "The said contract contemplated a good, sound first class job on the part of the plaintiffs (another conclusion, not a pleading of fact) and plaintiffs wholly failed to perform their contract in this regard, as heretofore alleged in paragraph 1 hereof." And paragraph 1 merely sets forth an admittance of the defendants to the effect that the plaintiffs were hired to do certain plumbing, steam fitting and metal work and furnish certain materials, including efficient heating plant. That being the only allegation in the pleading on which to base this finding.

In the first place this finding of fact is a presumption, based upon a presumption. First it must be presumed that there was a contract to do a particular thing in a particular way and second, a presumption that the defendants failed to perform their part of said contract and it is true that a presumption may be based upon a fact proven, but a presumption based upon another presumption is insufficient to sustain a finding of fact. There is, literally, not one word of evidence to sustain a finding that there was a contract to do a first class job in installing a heating plant in said building. But as pointed out above the fall of the year was coming on and the defendants were building a road house near the Town of Fairbanks with a bar room, a dance hall and an iron railing between a part thereof, and the Court will take judicial knowledge of the severity of the weather in and around Fairbanks, Alaska, and the testimony is undisputed to the effect that there was an extreme shortage of heating equipment in that vicinity and, in fact, there was a general shortage of heating equipment throughout the United States at that time and the undisputed testimony shows this shortage of materials. The defendants themselves testified to obtaining a part of this material from the ruins of a burned building. That Mr. Lane recommended a hot water system but the basement was full of water and this could not be installed and something in the nature of a temporary heating plant had to be installed and it was understood that what was done would be removed later and a better plant put in.

There was never any contract to do any particular thing except to furnish certain labor and certain materials for the defendants. The supervision of the work was rendered by George Gilbertson and if the old burner was defective it was his responsibility. This is not denied anywhere but is testified to by both plaintiffs and defendants. It must also be borne in mind that they used this heating system for a year and then did install a hot water system in the basement of the building where they originally intended that it should be. There was no evidence whatsoever anywhere to the effect that this heating plant was not of any reasonable value whatsoever except the two unit radiators. But on the contrary this plant furnished defendants service for one year. Therefore this finding of fact has no evidence whatsoever to sustain it and is specifically contrary to the evidence and should be reversed. The most damaging evidence that anyone testified to is set out above in subdivision "A" and I make it a part of this subdivision "B" by reference as fully as if set out here again, and there is nothing to sustain this finding anywhere.

C.

The Court erred in making the finding of fact No. 3 in the following:

"That said defendants detached from said building and premises, and refused to keep the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and for which plaintiffs had charged said defendants the

sums of \$175.00 and \$100.00 respectively; that said defendants tendered said boiler and oil burner, as personal property, back to plaintiffs, and the same are now their property.”

In the first place, there was no pleading to justify such a finding; there is not a word in the answer to that effect. In the second place there was no competent testimony upon which to base it, and third, it would be an equivocal conclusion to find that the boiler and oil burner, which were unquestionably, a part of the real estate at the time of the filing of this lien and the suit to enforce it, were detached and became chattel property and were accepted back by the plaintiffs when there is no evidence to sustain such a finding and is therefore an error on the part of the trial judge, and the finding of fact is not proper and should not be sustained, as it is not only contrary to the great weight of the evidence, but there is no evidence to sustain it and no pleading to justify the introduction of any such evidence and plaintiffs objected to any and all evidence concerning same, and then moved to strike all testimony that in any way touched thereon.

D.

The finding of fact number 4 to the effect, “That between the 16th day of August, 1944 and the 20th day of December, 1944, both dates inclusive, plaintiffs and said defendants entered into an oral contract whereby plaintiffs agreed to furnish and install certain plumbing and sheet metal in said Ranch building, and said

defendants agreed to pay therefor the reasonable value thereof." Finding of fact number 5 following this one: "That, pursuant to said last mentioned agreement, plaintiffs furnished and installed said plumbing and sheet metal in said Ranch building, the last material being furnished and the last labor in the installation of the same being done upon the 20th day of December, 1944", and number 6 following: "That the reasonable value of said plumbing and sheet metal and the installation of the same was as shown upon Plaintiffs' Exhibit A introduced in evidence herein, to-wit: \$326.79, composed of the following: Plumbing, \$57.00; Well point, \$8.00; Xzit, \$2.00; Spray pump, \$1.00; 2-inch coupling, \$1.10; Fittings, \$13.30; Balance on electric range, \$50.00; Fittings, \$3.15; Sheet metal, \$191.24."

And finding number 7 following, to-wit: "That plaintiffs' lien claim in this action having been filed for record upon the 21st day of March, 1945, was filed more than ninety days after the last work or last material was furnished under said contracts, and, therefore, was filed after the time allowed by law for filing such a lien claim."

And finding of fact 8: "That upon the 24th day of December, 1944, plaintiffs made a service call to adjust or repair the oil burner at said Ranch building and made a charge of \$3.00 therefor; that said charge was not pursuant to the above mentioned contracts, or either of them, and formed no part of the performance of either of said contracts, and no lien claim was

filed for said \$3.00 charge." It seems to be a violent presumption and not based upon the evidence and is contrary thereto. I have grouped these assignments of error for argument to save space in the brief and so that it can be made more clear to the Court. There is no evidence at all of any separate contract for the plumbing and sheet metal work. There is no evidence that there was any separate and distinct agreement, order or contract of any kind to separate the plumbing work and sheet metal work from the heating work. The evidence clearly shows that the work was all done on what is known to the parties hereto as a time and material job in which the time was to be at \$3.00 per hour and the material at the regular and customary price charged for similar material in the vicinity of Fairbanks, however, practically all of the material used was purchased by the defendants from the plaintiffs at an agreed price as is shown by all of the evidence. The boiler, the burner, the plumbing, the unit heaters, all were picked out and the price agreed upon by the parties and that all of the labor was furnished as service and furnished upon call of the defendants and the undisputed evidence is that on the 24th day of December a man working for the defendants, having tampered with and tried to fix the oil burner, had broken the electrode and the plaintiffs were called there to make the heater plant work and Mr. Lane testified and it stands undisputed that he went there and did the work on the 24th day of December, 1944, at the instance and request of the defendants. And that he made a ticket out showing a charge of \$3.00

on that date and this ticket was offered and reoffered in evidence repeatedly and was always refused admission by the Court even though it was identified as being made at the time the work was done in the due and regular course of business and was a part of the permanent records and bookkeeping system of the plaintiffs and was made in compliance with their regular system of bookkeeping and was the first and original record made of said transaction and that the charge made therefor was reasonable and customary. The work was done and that they had never been paid therefor.

Now the Court's finding that the lien filed on the 21st day of March, 1945, was filed more than 90 days after the last work or material was finished on said contracts and therefore filed after the time allowed by law for filing such lien claim.

There were seven days left in December, thirty-one in January, and twenty-eight in February, and twenty in March, the lien having been filed on the 21st day of March, which made only eighty-six days, and the law specifically allowed ninety (90) days for the filing of the lien; therefore, the seventh finding of fact is unquestionably based upon the fifth finding of fact that the last plumbing and sheet metal work was done on the 20th day of December, 1944, and the trial judge has evidently either overlooked, or wished to disregard the evidence showing the labor done on the 24th day of December, 1944, that is either admitted or stands undenied throughout the entire evidence.

It will be noticed that the testimony of Mr. Lane, also the testimony of Mr. Reed, stand undisputed that the whole job was done just as a service job according to their custom, or a time and material job, and that the work done on the 24th of December was done just like the rest and under the same circumstances, and at the request of the defendants.

F.

As the conclusion of law No. 1 found in transcript at page 30, which is as follows:

“That plaintiffs have no lien upon said Ranch building or premises described in the amended complaint herein, and that they take nothing by this action”,

is purely erroneous and is based upon findings of fact that are contrary to the evidence and supported by no evidence and this conclusion of law is wrong. There is no evidence, not the slightest word thereof, to the effect that the plaintiffs ever agreed to do anything for the defendants except furnish some labor and some material. The greatest share of the material furnished was examined and the price agreed upon by George Gilbertson at the time the arrangement for the delivery thereof was made.

Therefore, there was no contract to put in a heating plant in any particular method. There was an order to install a boiler to put in a certain burner that George Gilbertson picked out and paid for in the sum of \$250.00. There was an order made by George

Gilbertson cutting off all supervision after informing the plaintiffs that he was a steamfitter, experienced in that line, and the supervision was assumed by him. This is undisputed and is even corroborated by George Gilbertson himself in his testimony. There was no implied warranty that this boiler was adequate, however, there is plenty of evidence to the effect that it was adequate and there is not a scintilla of evidence anywhere to the effect that the boiler was defective or inadequate in any way. There is some evidence that the second burner installed, the old second-hand burner, that was sold to the defendants, by which they agreed to pay the sum of \$100.00 which has never been paid, was defective.

It was a violent conclusion and no evidence was admitted to sustain it. If George Gilbertson was a competent steamfitter as he claimed to be, he was capable of giving evidence as to the truth of what was wrong with the old big burner. Joseph Lane testified that he told George Gilbertson that this burner was an old, defective burner and that George Gilbertson wanted it put in and Lane told him that they would put it in for him for temporary use and that as soon as either the defendants or the plaintiffs could obtain another burner that this old one would be taken out and defendants would be given credit for the full \$100.00 therefor.

Now this has not been denied and stands admitted here. Even Harvey Gilbertson testified that he knew it was an old second-hand burner at the time they

bought it. It is so apparent from the evidence and the reasonable inferences to be drawn therefrom that there was a determined effort on the part of the defendants to defeat these plaintiffs and to prevent paying them for their labor and material furnished. All of this seems to be a result of revenge due to the filing of the lien as shown in the testimony of George Gilbertson. Now unquestionably after the work was all done, Joseph Lane and George Gilbertson went over the bills, over the labor tickets and invoices and agreed after a few minor corrections that they were correct and that \$1429.76 was the balance due thereon and this is further supported by the fact that the plaintiffs waited until their lien right was near an end before filing their lien, evidently expecting to receive pay for their work and material.

Conclusion of law number 1 to the effect that the plaintiffs have no lien upon the Ranch building or premises and that they take nothing by this action is an improper conclusion of law to be based upon the facts as shown by the testimony and upon the pleadings in the case.

G.

The second conclusion of law, to-wit: That said defendants have paid in full all sums due to plaintiffs upon their contracts, is equally as biased and exemplifies the prejudicial feeling of the trial judge in this case as strongly as conclusion of law number 1, and is not based upon any competent evidence and should be reversed by this Honorable Court.

I.

Conclusion of law number 3 to the effect that the boiler and oil burner which were detached from said heating system by said defendants are the property of the plaintiffs, is the most erroneous conclusion of law that I can think of. There is not a scintilla of evidence anywhere to the effect that there was anything wrong with the boiler and, on the contrary, the fact that it was used for approximately one year and then replaced by a hot water system installed in the basement, goes to show that they merely carried out their original arrangements to install and use a temporary heating plant, made up of second hand equipment since new and better equipment was unavailable.

And the equivocal conclusion that the oil burner and boiler were detached from the heating system which had become a part of the real estate to which it was attached and become a part thereof, and the conclusion that this boiler and burner, and the boiler in particular, after having been used for about one year, and served the purpose for which they were installed, were the property of the plaintiffs, is in circumvention of all the recognized principles of law effecting mechanic's liens. If this was the law, any plumber or steamfitter would be unsafe in installing and furnishing plumbing fixtures or steam fixtures in any home because the man to whom it was furnished could refuse and neglect to pay therefor, until a suit was filed, as was done in this case, and then go out and disconnect the fixtures, and then say to the person who in-

stalled them, "You can't recover in your action because I have disconnected them from the real estate and you can take back your fixtures." If this was the law, it would nullify all of the efforts of the legislative bodies throughout the United States in their endeavor to establish a law to protect the contractor and the laborer by the passing of proper lien statutes.

This heating system became a part of the real estate, was used in this roadhouse, dance hall and bar for about a year, and must have been of valuable service to the defendants herein, and naturally when the war was over and more equipment was available and possible for the purpose of defending in this lawsuit and without the knowledge or consent of the plaintiffs, did install in the basement a hot water system which they would like to have done in the first instance and unquestionably the plaintiffs would also have liked to have done this job with new and adequate equipment but it was unavailable.

Now as to conclusion of law 4. "That said defendants are entitled to recover from plaintiffs their costs and disbursements of this action" and 5, "that judgment and decree may be entered accordingly", are, of course, based solely on the findings of fact and the 3 first conclusions of law. And if the findings of fact and the conclusions of law are vacated or set aside these particular conclusions of law, 4 and 5 will fall therewith.

I am not unmindful of the equity rule that findings of fact and conclusions of law are binding on the

court if supported by evidence and are not against the clear weight of the evidence and clearly erroneous. But in view of the many cases holding that the appellate court, in determining whether the district court's findings are correct or clearly erroneous within the court rule, may examine the evidence and if the findings of fact or any of the material findings of fact sufficient to affect in any way the judgment are wrong or against the clear weight of the evidence or unsupported by any competent evidence, then the finding or findings are clearly erroneous and against the clear weight of the evidence. In support of this contention I quote from *Fleming, Adm'r of Wage and Hour Division, Dept. of Labor, v. Palmer, et al.* The first and second syllabus read as follows:

1. Courts. Key 406(11¼).

Under rule that fact findings, in trial by court without a jury, shall not be set aside unless clearly erroneous, a finding of fact is "clearly erroneous" if it is against the clear weight of the evidence, and it does not suffice that it is supported by evidence. Federal Rules of Civil Procedure, rule 52(a), 28 U.S.C.A. following Section 723c.

See Words and Phrases, Permanent Edition, for all other definitions of "Clearly Erroneous".

2. Courts. Key 406(11¼).

In determining whether District Court's finding in nonjury case is correct or "clearly erroneous" within court rule, appellate court may examine documentary evidence, which it is as competent to consider as the

District Court, and testimony on which there is no conflict. Federal Rules of Civil Procedure, rule 52(a), 28 U.S.C.A. following Section 723c.

And from the body of the opinion on page 751, we quote:

“Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c. *A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence.* (Italics ours.) *Aetna Life Ins. Co. v. Kepler*, 8 Cir., 1941, 116 F.2d 1; *State Farm Mutual Automobile Ins. Co. v. Bonacci*, 8 Cir., 1940, 11 F.2d 412; *Manning v. Gagne*, 1 Cir., 1939, 108 F.2d 718; Fed. Rules of Civil Procedure and the American Bar Institute Proceedings, p. 316 et seq. (Cleveland, 1938); Clark & Stone, Review of Findings of Fact, 4 U. of Chi. L. Rev. 190 (1937).”

Certiorari was denied by the United States Supreme Court in the above case and the order of denial is found in 316 U. S. at 662.

From the cases referred to I quote from *Aetna Life Ins. Co. v. Kepler*, 116 Fed. (2d) page 1. This opinion is by the fine old gentleman, Judge Sanborn, and seems to clearly point out the reason for the change in the rules of considering cases tried by the court without a jury. The third and fourth syllabus reads as follows:

3. Courts Key 406 (1¼)

Under federal rule of civil procedure that fact findings shall not be set aside unless clearly

erroneous, Circuit Court of Appeals is no longer merely court of error which considers only law questions in jury-waived cases, but acts as court of review in all nonjury cases in accordance with practice which formerly prevailed in equity appeals. Federal Rules of Civil Procedure, rule 52(a), 28 U.S.C.A. following Section 723c.

4. Courts Key 406(1¼)

In nonjury case, trial court's fact findings, unsupported by substantial evidence, clearly against weight of evidence, or induced by erroneous view of law, are not binding on Circuit Court of Appeals.

And from the body of the opinion on pages 4 and 5, I quote:

(3). Prior to the effective date (September 16, 1938) of the Rules of Civil Procedure, the findings of fact of a trial court, in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. *A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and, unless clearly against the weight of the evidence or induced by an erroneous view of the law, would not be disturbed by a reviewing court.* (Italics ours.)

Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, provides: “* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *”

The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.

This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all nonjury cases in accordance with the practice which formerly prevailed in equity appeals. (Italics ours.)

(4). The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, *are not binding upon this Court.* (Italics ours.)

This is stated clearly in *State Farm Mut. Automobile Ins. Co. v. Bonacci, et al.*, 111 Fed. (2d) 412, and from the body of the opinion we quote on page 415, which is as follows:

“The new practice, now incorporated in the Civil Procedure rules, accords with the decisions on the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether the finding is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony.”

“Under the new practice, where findings are made by the court without a jury, *the appellate court is not limited to the mere question whether there is any substantial evidence to support them,*

but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the special qualifications of the trial judge to pass on credibility."

It seems that the 7th Circuit adhered to the same rule in the case of *J. S. Tyree, Chemist Inc. v. Thymo Borne Laboratory*, 151 Fed. 621.

I know that the 7th Circuit has very recently passed on this same question in the case of *Chatz v. Armour Plant Employees' Credit Union*, 154 Fed. 236, 1 syl.

1. Courts Key 406(11¼)

"A challenge of a finding of fact must be examined on appeal where the appellant asserts that the District Court's finding is unsupported by substantial evidence or is contrary to the clear weight of the evidence or is induced by an erroneous view of the law." Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A. following Section 723c.

Since there is no evidence to sustain the findings of fact and since they are clearly against the weight of the evidence, and there are so many errors in the admissibility of evidence wherein competent and relevant evidence has been excluded and incompetent evidence admitted. It is quite apparent that there was some prejudice in the action of the trial Court or a clear mistake of law which resulted in an injustice to the plaintiffs. The testimony showed clearly an adjustment of the account after all the work was done and this was never directly denied by the defendants, and it was supported by the amended statement which

was in the possession of the defendants at the time of trial.

The testimony of the damage done by smoke not being competent either under the laws of Alaska or the pleadings in the case, there being no evidence upon which a warranty could be justly based, and no evidence of the denial of the account as agreed upon after the work was finished, it was error of the Court to make the findings of fact as made and to render a judgment denying these plaintiffs recovery for the labor and material furnished when the evidence shows conclusively that it was put in as a temporary heating unit to be later substituted by a plant in the basement and since it was used a year by the defendants the walls and linens would naturally need cleaning.

It is appellants' contention that this honorable Court should reverse this case and render a just and reasonable judgment granting the plaintiffs a recovery for their labor and material, establishing their lien and allowing them a reasonable attorney's fee for handling this case, both in the lower Court and in this Court.

Dated, Fairbanks, Alaska,
October 30, 1946.

Respectfully submitted,
BAILEY E. BELL,
WARREN A. TAYLOR,
Attorneys for Appellants.

No. 11,384

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of Reed and Lane, Plumbers, Heaters and Sheet Metal,

Appellants,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as The Ranch; and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA,

Appellees.

**Appeal from the District Court for the Territory
of Alaska, Fourth Division.**

**BRIEF OF APPELLEES,
GEORGE GILBERTSON AND HARVEY GILBERTSON.**

CECIL H. CLEGG,

Fairbanks, Alaska,

Attorney for Appellees,

George Gilbertson and Harvey Gilbertson.

Subject Index

	Page
Statement of case	1
Argument	2

Table of Authorities Cited

Cases	Page
U. S. v. Summers, 231 U. S. 92.....	5
 Statutes	
Compiled Laws of Alaska, 1933, Sec. 4252.....	3

No. 11,384

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Appellees.

Appeal from the District Court for the Territory
of Alaska, Fourth Division.

BRIEF OF APPELLEES,

GEORGE GILBERTSON AND HARVEY GILBERTSON.

STATEMENT OF CASE.

This was a suit in equity for balance of an alleged account asking for enforcement of an alleged lien under the Alaska lien statutes for work and materials, in which judgment was awarded defendants.

The answer of defendants Gilbertson denied the account and the items thereof, and charged incompetency of plaintiffs, cancellation of contracts by defendants, and completion of contracts by others, who, as the evidence shows, received compensation in the sum of \$1,255.00. (R. 171.) Formal Reply by plaintiffs was filed.

ARGUMENT.

ASSIGNMENTS OF ERROR I, II AND III. (R. 46.)

(Appellants' Brief 91-95.)

Appellants complain of the action of the trial Court in sustaining three demurrers to complaints.

In this regard we answer that such rulings were harmless and were obviously beneficial to appellants in placing the *situs* of this property upon which a lien was sought within the Court's jurisdiction.

ASSIGNMENTS OF ERROR IV TO X, INC. (R. 46-58.)

(Appellants' Brief 95-112.)

On the trial no evidence was offered or introduced showing, or tending to show, that plaintiffs in the ordinary course of business maintained or kept any dependable or reliable bookkeeping system or method of handling their accounts generally. All the plaintiffs could show in that regard was that they had a slipshod manner of keeping track of the *time* claimed by workmen whom they hired. It amounted to each workman keeping his own time and reporting the

total time claimed for each day on these time cards. It contained no dependable or exact data as to materials furnished any customer. These cards were called in the evidence "time cards", and sometimes "invoices", and sometimes "tickets". (R. 104.) Some of these cards were claimed to have been initialed by the individual workmen and some had the name or names of workmen upon such card or cards.

These cards (none of which appear in the Bill of Exceptions) were nothing more than memoranda to which a witness might refer to refresh his memory, but for no other purpose. Our statute on this subject (Compiled Laws of Alaska, 1933, p. 834) reads as follows:

"Sec. 4252. When Witness May Testify or Refresh His Memory From Writing. A witness is allowed to refresh his memory, respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in writing. But in either case the writing must be produced, and may be inspected by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence shall be received with caution."

According to plaintiff Reed as a witness, the man in charge of the office of plaintiffs was a man named Calhoun, who was an incompetent bookkeeper. Who

he was, where he came from, and where he was on the date of trial, the evidence is entirely silent. Nothing in the way of the firm's books or book of account were produced by plaintiffs on the trial, nor was any suggestion made by appellants why said office manager Calhoun was unavailable as a witness for them. No employee of plaintiffs corroborated the testimony of either plaintiff concerning these cards.

The time cards, invoices, or tickets purporting to show a record of the time of certain workmen on the two separate contracts sued upon were of themselves insufficient as a basis of proof, even if accorded the fullest weight by the Court hearing the testimony. All objections of plaintiffs, either to their exclusion as a whole or separately, as so-called "exhibits" or to the refusal of the Court to allow their introduction if offered properly, can not avail appellants. They were each and 'all examined by the presiding judge and found wanting for this purpose. No error was committed by the Court in so doing. In the absence of all reliable testimony that such cards were a part of established *practice* in the regular course of business of appellants, they were entitled to no consideration except as mere memoranda.

In a matter of this kind, the laws of the state or territory where suit is tried govern the Courts on the question of evidence. Alaska has the law above quoted and we are not bound by the general laws of the United States. Our law is definite on this subject and must be controlling here, affecting, as it does, a local law on local contracts.

In *U. S. v. Summers*, 231 U. S. 92, the Supreme Court has held that our criminal code must be given force and effect throughout Alaska, that such code was designed by Congress with knowledge of conditions in Alaska, and that it is complete and circumstantial as a full criminal code in all respects. No less can be said about our Civil Code enacted at the same time, and, as such, its laws are enforceable until changed or amended in the manner provided by law.

ASSIGNMENTS OF ERROR XIII, XIV AND XV. (R. 60-61.)
(Appellants' Brief 112-117.)

Assignment XIII. It is claimed that appellants' motion to strike certain testimony as "outside of the issues" was well taken. That such testimony was well within the issues appears by reading the Answer and Reply.

Assignment XIV. By reading the testimony quoted in this Assignment, it will be seen that the question objected to was answered before objection was made, and that the ruining and destruction of the premises was a matter in direct issue. No motion to strike the answer was made.

Assignment XV. This motion to strike was also *within the pleadings* and no question of warranty was made an issue on the trial at any time.

Counsel here seized a supposed opportunity to inject their personality into the brief by making some unsound deductions of their own to the effect that

appellees made no claim for damages. On page 116, they assert again a presumption as to why no such claim was made but they give the wrong reason. It may well be concluded that the reason defendants made no counterclaim for damages was because they knew 'it to be impossible to extract blood from a turnip.

ASSIGNMENTS OF ERROR XVI AND XVII. (R. 62-63.)

(Appellants' Brief 117-121.)

These two offers are in the same category. They are not concerned with impeaching questions or even attempts to lay the ground for impeachment. Merely a desire is indicated by plaintiffs to lead the defendants into a wild goose chase and prolong the case concerning immaterial and irrelevant matters as to which neither equity, law, nor justice would be aided thereby.

ASSIGNMENTS OF ERROR XVIII AND XIX. (R. 64-67.)

(Appellants' Brief 121-145.)

The remainder of Appellants' Brief is taken up with argument concerning matter of no consequence relative to supposed errors of the Court as to the Findings of Fact and Conclusions of Law.

These alleged errors are subdivided into: A, page 121; B, page 128; C, page 130; D, page 131; and F, pages 135 to 145. E, apparently, is omitted entirely.

On February 6, 1946 (R. 31) a motion for new trial was filed and on February 21, 1946 (R. 35), without leave of Court, an amended motion for new trial was filed. The order denying motion for new trial is found at page 40 of the Record.

These two motions for new trial are not identical but are the same in spirit and cover a multitude of assigned errors, such as we have been discussing. They take in everything done by the Court considered inimical to the interests of plaintiffs.

Yet the record shows that on March 15, 1946, when this motion, or these motions, were set and called for hearing, no appearance was made for plaintiffs. They were not present, nor were their attorneys. They defaulted. (R. 40, 197.)

We therefore submit that appellants *waived* each of said motions and are in no position now to mention the subject in their brief or anywhere else.

It is not claimed that the Court committed any abuse of discretion, which is the only ground on which appellants could stand.

The alleged grounds set up in said motion or motions are ephemeral, insubstantial, and not specific. In many instances, they concern matters raising a mere conflict in evidence as to which the trial Court found for defendants, appellees. This Court, therefore, is obliged to have the rule enforced that the trial Court's rulings thereon will not be disturbed by an Appellate Court. This certainly must be the case

where the losing party defaults and remains away from the courtroom when the hearing on such motion or motions is or are set for hearing and are heard considerately.

The Court heard and saw the witnesses and gave the entire case calm, learned, and considerate attention and its judgment should be in all things affirmed.

Dated at Fairbanks, Alaska, December 12, 1946.

Respectfully submitted,

CECIL H. CLEGG,

Attorney for Appellees,

George Gilbertson and Harvey Gilbertson.

Due service of the foregoing Brief of Appellees Gilbertson, and receipt of copy thereof, acknowledged December 12, 1946.

WARREN A. TAYLOR,

Of Attorneys for Appellants.

No. 11388

United States
Circuit Court of Appeals
For the Ninth Circuit.

WELLS, INC., a Corporation,	Petitioner,
vs.	
NATIONAL LABOR RELATIONS BOARD,	Respondent.
and	
NATIONAL LABOR RELATIONS BOARD,	Petitioner,
vs.	
WELLS, INC., a Corporation,	Respondent.

Transcript of Record

Upon Petition for Review, and Petition to Enforce an Order
of the National Labor Relations Board.

FILED

JAN - 8 1947

PAUL P. O'BRIEN,
CL

No. 11388

United States
Circuit Court of Appeals
For the Ninth Circuit.

WELLS, INC., a Corporation,	Petitioner,
vs.	
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of the National Labor Relations Board.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer	10
Answer of the N.L.R.B. to Petition for Review of Its Order and Request for Enforcement of said Order	334
Answer and Reply to Petition for Review of Respondent's Order and Request for Enforce- ment of said Order	342
Appearances	72
Board Exhibit of Record	297
Board's Counter Designation of Record	345
Certificate of the National Labor Relations Board	12
Complaint	3
Decision and Order	21
First Amended Charge	1
Intermediate Report	42
Notice of Hearing	8
Objections to the Intermediate Report Recom- mendations, Findings of Fact and Conclu- sions of Trial Examiner	18
Oral Argument on Behalf of the N.L.R.B.	282

INDEX	PAGE
Oral Argument on Behalf of the Respondent ..	287
Order Designating Trial Examiner	14
Order Transferring Case to the National Labor Relations Board	16
Petitioner's Amended Designation	346
Petition for Review	323
Proceedings	73
Points Relied Upon in Support of Petition for Review	332
Witnesses for N.L.R.B.:	
Anderson, Glen O.	
—Direct	127
—Cross	133
—Redirect	135
—Recross	139
Apperson, K. C.	
—Direct	80
Benton, Jack C.	
—Direct	81, 189, 202, 270
—Cross	102, 213, 271
McBride, C. H.	
—Direct	196
—Cross	199
—Redirect	200, 201
—Recross	201, 202

INDEX

PAGE

Witnesses for N.L.R.B.—(Continued)

McKay, George E.

—Direct 105

—Cross 124

McShane, T. E.

—Direct 143

—Cross 170

Witnesses for Respondent:

Divine, H. B.

—Direct 219, 230

—Cross 222

—Redirect 225

—Recross 226

Wells, J. W.

—Direct 232, 279

—Cross 250

—Redirect 259, 265

—Recross 262

Before the
National Labor Relations Board

Case No. 20-C-1306

In the Matter of:

WELLS, INC.,

and

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS

FIRST AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Wells, Inc. at P. O. Box 29, Reno, Nevada, employing 14 workers in long distance trucking has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (3) and (5) of said Act, in that on or about January 31, 1945, it, by its officers, agents, and employees terminated the employment of Jack Benton solely because of his membership in and activities

on behalf of International Association of Machinists, a labor organization, and at all times since such date has refused and does now refuse to employ the said Jack Benton in violation of Section 8, subdivision (3) of the Act.

On or about May 16, 1944, at all times since that date, and particularly on October 5 and December 22, 1944, it, by its officers, agents and employees has refused and now refuses to bargain collectively with the authorized agents of International Association of Machinists, a labor organization chosen by a majority of its employees at its Reno, Nevada, shop for collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment in violation of Section 8, subdivision (5) of said Act.

By all the acts set forth in the paragraphs above, and by disparaging the Union, ordering employees to refrain from Union discussions in the shop, discriminatorily refusing a Union representative admission to its premises, threatening to move its operations from Reno to Salt Lake City, interrogating its employees with respect to Union membership, and ridiculing an employee for wearing a Union button, it, by its officers, agents and employees interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8, subdivision (1) of the Act.

The undersigned further charges that said unfair

labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

INTERNATIONAL ASSOCIATION OF MACHINISTS,

By /s/ K. C. APPERSON,

Grand Lodge Representative,
Whitcomb Hotel, San Francisco.

Subscribed and sworn to before me this 9th day of August, 1945, at San Francisco, California.

/s/ WALLACE E. ROYSTER,
Attorney.

(Admitted Aug. 24, 1945.)

[Endorsed]: Filed Aug. 9, 1945.

[Title of Board and Cause.]

COMPLAINT

It having been charged by International Association of Machinists, that Wells, Inc., herein called the respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act,

49 Stat. 449, herein called the Act, the National Labor Relations Board, herein called the Board, by the Regional Director for the Twentieth Region as agent for the Board, designated by the Board's Rules and Regulations, Series 3, as amended, Article IV, Section I, hereby issues its complaint and alleges as follows:

I.

Wells, Inc., is and at all times herein mentioned has been, a Nevada corporation with its principal office and place of business in Reno, Nevada.

II.

Respondent is a common carrier of freight by motor truck in the States of Nevada and California under Interstate Commerce Commission Docket No. MC 43269. Respondent, in the course and conduct of its business, transports and continuously has transported substantial amounts of freight from points in Nevada to points in California and from points in California to points in Nevada. The respondent also delivers freight to interstate carriers at points in California and Nevada destined for points outside California and Nevada and receives freight from interstate carriers at points in California and Nevada which originated at points outside California and Nevada.

III.

International Association of Machinists, herein called the Union, is affiliated with the American Federation of Labor and is a labor organization

within the meaning of Section 2, subdivision 5, of the Act.

IV.

All mechanics, mechanic helpers, and greasers employed by the respondent at its shop in Reno, Nevada, constitute a unit appropriate for the purposes of collective bargaining.

V.

On May 16, 1944, the Union was, and at all times since that date has been the duly designated representative of a majority of the employees in the appropriate unit for the purposes of collective bargaining.

VI.

On May 16, 1944, at all times since that date, and particularly on October 5, 1944, and December 22, 1944, the respondent refused and now refuses to bargain collectively on request with the duly authorized representative of the Union.

VII.

Respondent, through its officers, agents, and employees, during about the months of December 1944 and January 1945, interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act by the following acts:

- (a) disparaging the Union.
- (b) ordering employees to refrain from Union discussions in the shop.

(c) discriminatorily refusing a Union representative admission to its premises.

(d) threatening to move its operations from Reno to Salt Lake City.

(e) interrogating its employees with respect to Union membership, and

(f) ridiculing an employee for wearing a Union button.

VIII.

Respondent, through its officers, agents, and employees, on January 31, 1945, discharged Jack Benton solely because of his membership in and activities on behalf of the Union and at all times since that date has refused and now refuses to reemploy the said Jack Benton.

IX.

By all the acts set forth and described in paragraphs VI, VII, and VIII, above, the respondent has interfered with, restraining, and coercing its employees and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby has engaged in, and thereby is engaging in, unfair labor practices within the meaning of Section 8, subdivision 1, of the Act.

X.

By its refusal to bargain as set forth and described in paragraph VI, above, the respondent has engaged in and is now engaging in unfair labor practices within the meaning of Section 8, subdivision 5, of the Act.

XI.

By the discriminatory discharge of Jack Benton as set forth and described in paragraph VIII, above, the respondent has engaged in and is now engaging in unfair labor practices within the meaning of Section 8, subdivision 3, of the Act.

XII.

The activities of the respondent as set forth and described in paragraphs VI, VII, VIII, IX, X, and XI, occurring in connection with the operations of the respondent described in paragraphs I and II, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XIII.

The acts of the respondent described above, constitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions 1, 3, and 5, Section 2, subdivisions 6 and 7 of the Act.

Wherefore, the National Labor Relations Board on the 9th day of August, 1945, issues its Complaint against Wells, Inc., a corporation, respondent herein.

[Seal] /s/ JOSEPH E. WATSON,
Regional Director, National Labor Relations Board,
Twentieth Region.

[Endorsed]: Admitted Aug. 24, 1945.

[Title of Board and Cause.]

NOTICE OF HEARING

Please Take Notice that on the 24th day of August, 1945, at United States Attorney's Office, Third Floor of the Post Office Building, Reno, Nevada, at 10:00 o'clock in the forenoon, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for

the Twentieth Region on this 9th day of August, 1945.

[Seal] /s/ JOSEPH E. WATSON,
Regional Director, National
Labor Relations Board.

(In Ev)

[Endorsed]: Admitted Aug. 24, 1945.

[Title of Board and Cause.]

AFFIDAVIT OF SERVICE OF NOTICE OF
HEARING AND COMPLAINT

Date of Mailing August 9, 1945.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document (s) by post-paid registered mail upon the following persons, addressed to them at the following addresses:

Wells, Inc., P. O. Box 29, Reno, Nevada, Registry No. 915559. Date of delivery. August 11, 1945.

International Association of Machinists, c/o K. C. Apperson, Whitcomb Hotel, San Francisco, California. Registry No. 915560. Date of delivery: August 10, 1945.

/s/ PATRICIA MAGUIRE

Subscribed and sworn to before me this 17th day of August, 1945.

[Seal] /s/ ROSE C. CHAFFEE,

Designated Agent, National
Labor Relations Board.

(Signed Post Office receipts No. 915559 and 915560 attached.)

[Endorsed]: Admitted Aug. 24, 1945.

[Title of Board and Cause.]

ANSWER

Comes now the above-named respondent, Wells, Inc., and in answer to the complaint on file herein admits, denies and alleges as follows:

1. Admits the allegations contained in paragraphs one and two.

2. In answer to paragraph four, this respondent generally and specifically denies the allegations contained in said paragraph four, which provide that all mechanics, mechanic helpers and greasers employed by the respondent at its shop in Reno, Nevada, constitute a unit appropriate for the purpose of collective bargaining.

3. This respondent denies generally and specifically each and every allegation contained in said paragraphs five, six, seven, eight, nine, ten, eleven, twelve and thirteen.

4. This respondent denies generally and specifically each and every allegation contained in said complaint not otherwise specifically admitted herein.

Wherefore, respondent prays that the complaint in this matter be dismissed.

/s/ LOUIS H. CALLISTER,

Attorney for Respondent.

State of Utah,

County of Salt Lake—ss.

Howard A. Wells, being first duly sworn on oath, deposes and says: That he is the Vice-President of Wells, Inc., the respondent herein, and as such makes this verification; that he has read the foregoing Answer, knows the contents thereof, and the same is true according to his own knowledge except as to matters therein alleged on information and belief, and as to such matters he believes them to be true.

/s/ HOWARD A. WELLS

Subscribed and sworn to before me this 17th day of August, 1945.

[Seal] /s/ MARGARET A. LEHMAN,

Notary Public, residing in
Reno, Nevada.

My Commission Expires July 31, 1948.

(Received Aug. 20, 1945, N.L.B.)

[Endorsed]: Admitted Aug. 24, 1945.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11388

WELLS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 3, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of a proceeding had before said Board entitled, "In the Matter of Wells, Inc. and International Association of Machinists," the same being Case No. 20-C-1306 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order designating Howard Myers Trial Examiner for the National Labor Relations Board, dated August 24, 1945.

(2) Stenographic transcript of testimony held before Trial Examiner Myers on August 24 and 25, 1945, together with all exhibits introduced in evidence.

(3) Copy of petitioner's letter dated September 11, 1945, requesting extension of time to file brief before the Trial Examiner.

(4) Copy of telegram, dated September 21, 1945, granting all parties extension of time to file brief before the Trial Examiner.

(5) Copy of Trial Examiner Myer's Intermediate Report, dated October 17, 1945 (annexed to item 10 hereof).

(6) Copy of order transferring Case to the Board, dated October 23, 1945.

(7) Copy of petitioner's telegram, dated November 6, 1945, requesting extension of time to file exceptions and brief.

(8) Copy of telegram, dated November 8, 1945, granting all parties extension of time to file exceptions and brief.

(9) Copy of petitioner's exceptions to the Intermediate Report.

(10) Copy of decision and order issued by the National Labor Relations Board on June 12, 1946, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof the Chief of the Order

Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 6th day of September, 1946.

[Seal]

JOHN E. LAWYER,
Chief, Order section
National Labor Relations
Board.

[Title of Board and Cause.]

ORDER DESIGNATING TRIAL
EXAMINER

It Is Hereby Ordered that Howard Myers act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations—Series 3, as amended, of the National Labor Relations Board.

Dated, Washington, D. C., August 24, 1945.

/s/ FRANK BLOOM,
Chief Trial Examiner.

September 11, 1945

Mr. Wallace E. Royster, Attorney
National Labor Relations Board
1095 Market Street
San Francisco (3), California

Re: Wells, Inc.
Case No. 20-C-1306

Dear Sir:

Mr. Louis H. Callister is presently in Washington, D. C. appearing before the National War Labor Board. He expects to return to Salt Lake City on either the 17th or 18th of September, 1945.

He has asked that I write to you and request an extension in which to file his brief in the above-entitled matter. If it is agreeable with your Board, he would like to have an extension to and including the 27th day of September in which to file the brief.

We would appreciate advice from you as to whether or not this extension can be granted and would also appreciate you notifying the Examiner who heard the case, of your decision.

Thanking you in advance for your consideration, I remain

Very truly yours,

/s/ E. R. CALLISTER,
Associate.

September 21, 1945

E. R. Callister,
Continental Bank Bldg.
Salt Lake City, Utah

Wallace E. Royster, Attorney
Nalt. Labor Relation Board
1095 Market Street
San Francisco, California

Briefs may be filed re Wells, Inc., Case 20-C-1306
if mailed by September Twenty-seven.

SAMUEL H. JAFFEE,
Associate Chief Trial Exam-
iner,
National Labor Relations
Board.

[Title of Board and Cause.]

NLB-1403

9/26/45

**ORDER TRANSFERRING CASE TO THE
NATIONAL LABOR RELATIONS BOARD**

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

It Is Hereby Ordered, pursuant to Article II, Section 32, of National Labor Relations Board Rules

and Regulations—Series 3, as amended, that Case No. 20-C-1306 be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., October 23, 1945.

By direction of the Board:

JOHN E. LAWYER,
Chief, Order Section.

WU D62 35/34 11 Extra

Salt Lake City, Utah, Nov. 6, 1945 1212P

National Labor Relations Board
Rochambeau Bldg.

Would like additional ten days to file briefs, etc., in Wells, Inc. Case, No. 20-C-1306. Mr. Callister in San Francisco for past week.

Lois Krause, Secretary, 619 Continental Bank Building, Salt Lake City, Utah, Telephone 3-3819.

327P

INC 20-C-1306 619 3-3819 . . .

National Labor Relations Board

Louis H. Callister

619 Continental Bank Bldg.

Salt Lake City, Utah

K. C. Apperson

306 Pacific Bldg.

Oakland, California

National Labor Relations Board

San Francisco, California

November 8, 1945

Re: Wells, Inc., 20-C-1306

Time for filing exceptions and briefs extended
to November 19.

NATIONAL LABOR RELATIONS BOARD

[Title of Board and Cause.]

OBJECTIONS TO THE INTERMEDIATE REPORT RECOMMENDATIONS, FINDINGS OF FACT AND CONCLUSIONS OF TRIAL EXAMINER

Comes now the above named respondent, Wells, Inc., and objects to the recommendations upon the grounds that they are not supported by the evidence in this cause; objects to the conclusions of law found by the Trial Examiner upon the grounds that the same are not based upon the evidence, and

further, that said conclusions of law have no basis in fact or in law.

This respondent further objects to the findings of the Trial Examiner upon the grounds that the same are not supported by the evidence in this cause.

The respondent further objects to the conclusions of the Trial Examiner as follows:

1. That it is in violation of the National Labor Relations Act for an employer to discharge a foreman (which was stipulated that he had the right to hire and fire and direct all the activities of the sixteen employees) who participates in organization of a union, thereby subjecting the employer to unfair labor practices. This respondent does not admit that this was the grounds for the discharge, but was for the reason that the foreman desired to be removed from his duties as foreman and become a mechanic. The company was not willing to agree to this; however, accepting the findings of the Trial Examiner, this respondent objects to his conclusions of law on the grounds that an employer has the right to discharge a foreman who, as stipulated, has the right to hire and fire, direct and control the activities of the entire personnel of the unit appropriate for the purpose of collective bargaining, who participates in union activities by soliciting union membership among the employees whom he supervises. The Trial Examiner in effect is finding that the National Labor Relations Act prohibits an employer from discharging a foreman who

coerces or solicits union membership, thereby subjecting the company to violation of the National Labor Relations Act. He, therefore, holds that the company has no control over the activities of the foreman, and cannot take disciplinary action or discharge the foreman for subjecting it to a violation of the National Labor Relations Act. It is significant that the Trial Examiner does not cite any authorities to substantiate his position.

2. The company further objects to the findings and conclusions of the Trial Examiner in alleging that the respondent herein has refused to bargain with the majority representative of its employees in an appropriate bargaining unit. No unit was ever agreed to prior to the hearing of this cause in Reno. Query: Can an employer be guilty of refusing to bargain as to the terms and conditions of employment when they are unable to agree as to the appropriate unit?

The company objects to the examiner's finding that the union had stated to Wells, Inc. that the only unit they sought consisted of all persons doing mechanical work in the body shops as mechanics, thereby finding that a unit had been agreed to. The complaint in this cause definitely, unequivocally and with certainty alleges the appropriate unit to be employees other than that which the examiner finds had been agreed to by the union and the company as an appropriate unit for the purpose of collective bargaining. The unit alleged in paragraph four of the complaint by this board as appropriate

included, in addition to mechanics and mechanics helpers, greasers.

3. The company objects to the findings and conclusions of the Trial Examiner that the respondent interfered, restrained and coerced its employees in the exercise of their rights to self-organization, one of the bases for this finding by the Trial Examiner being that the company representative made a slighting remark to their foreman, whom it was stipulated had the right to hire and discharge, and who had control of the employees in the appropriate unit, against unionism. The company objects to the findings and conclusions of this examiner that the company, under the National Labor Relations Act, has no right to discipline or take such action as it deemed necessary to stop such employees from subjecting it to violation of the National Labor Relations Act. If the company makes a slighting remark about the union to one of its executives, and this is a violation of the National Labor Relations Act, then it precludes the right of the employer to discipline its executives and foreman.

Respectfully submitted,

WELLS, INC.

By LOUIS H. CALLISTER,

Attorney.

[Title of Board and Cause.]

DECISION AND ORDER.

On October 17, 1945, the Trial Examiner issued his Intermediate Report in the above-entitled pro-

ceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except insofar as they are inconsistent with our findings and order hereinafter set forth.

1. We agree with the conclusion of the Trial Examiner that the respondent discriminated in regard to the hire and tenure of employment of Foreman Benton and thereby discouraged membership in the Union in violation of Section 8 (3) of the Act.

It is the respondent's contention that Foreman Benton was discharged, following his request either for a raise or for a demotion to the position of an ordinary mechanic, because demotion of a foreman to a non-supervisory status "has never been satisfactory"; such employees would "not take orders and subject themselves to disciplinary action by the

new foreman" as would other employees.¹ It is our opinion, and we find, that the respondent merely used this situation as a pretext for terminating Benton's employment in order to discourage union membership. At the outset, it must be observed that Superintendent Divine's original reaction to Benton's alternative request for demotion was not unfavorable. In fact, Divine and Benton even explored the possibility of Benton's going to work as a mechanic on the night shift where they had "a little bit of trouble." Benton made his request for a raise or, in the alternative, for demotion, sometime in the latter part of December 1944 or the first of January, 1945 at which time he was told by Superintendent Divine: "I think everything can be arranged and don't worry." Benton heard nothing more about the matter until January 31, when he was summarily discharged at the end of the working day, without any advance notice. It was then that Divine for the first time advanced the alleged impracticability of demotion as a reason for the denial of Benton's request.²

¹At the hearing, when Superintendent Divine was questioned about the reason for his refusal to demote Benton, he testified: "I have run shops since 1930 and I have tried demoting several foremen to mechanics and they won't concentrate on the work. They are constantly criticizing, and for that reason I didn't want to try Jack Benton as an ordinary mechanic."

²Superintendent Divine, in effect, testified that Foreman Benton came to him about January 25 and asked him if it was possible to get more money and

Benton's services both as a mechanic and as a foreman were entirely satisfactory. The discharge took place prior to V-J Day at a time when there was a manpower shortage prevailing throughout the country, and when, as Benton testified without contradiction, the respondent "didn't have the qualified men." Under these circumstances it is highly significant that the respondent not only failed to grant Benton's request for demotion, but did not give him an opportunity to remain as foreman at the same salary. Plainly, the language of Benton's request for a raise or demotion could not be construed as an ultimatum that he was unwilling to continue as a foreman at the same salary if neither request were granted.³ Nor does the final conversation between Benton and Superintendent Divine indicate that Divine had placed such a construction on Benton's requests. Divine told Benton that he was "relieved" of his foreman's duties and that he could not work as a mechanic. In response to

if not that he would like to be relieved of the foreman's job and given a job as a mechanic. Divine, however, testified that the January 25 conversation was the first and only conversation he had with Benton and that he informed Benton at that time that he "didn't want him as a mechanic." To the extent that Divine's testimony conflicts with that of Benton, it is not credited.

³Foreman Benton testified that he said to Superintendent Divine, "... I wondered if I could get some more money. If that wasn't satisfactory, I wondered if he could get another foreman and give me a job back as a mechanic."

Benton's query, "In other words you mean that I am fired?", Divine replied, "If you look at it that way, yes."

The respondent's hostility to the Union and its desire to frustrate organizational activities of the Union among its rank and file employees furnish a reasonable explanation for its discharge of Benton. Its hostility to the Union is reflected throughout the record. Through its officials, the respondent prevented the union representative from collecting union dues in the shop during non-working time; questioned employees concerning their union membership and activities, made disparaging remarks concerning the Union in the presence of rank and file employees; threatened to remove its operations to Salt Lake City rather than to submit to any of the demands of the Union in the proposed contract; and finally, engaged in dilatory tactics during the collective bargaining negotiations. The respondent's officials were fully aware of Benton's membership and interest in the Union. Indeed, W. E. Wells, the respondent's president, observed at one of the collective bargaining conferences that "Benton was responsible for his employees belonging to the Union" and "wishing to be represented by it." That a discharge of an active adherent of a union under circumstances which suggest no motivation other than hostility to the union, operates as a warning to all employees of the danger attached to adherence to the union, hence generally discourages union membership, cannot be denied. We conclude that the respondent discharged Benton because of its

manifest hostility to the Union and its desire to discourage membership therein by his discharge.

The fact that Benton was a supervisory employee does not relieve the respondent of its statutory obligation not to engage in discriminating conduct to discharge membership in the Union.⁴ We have held on prior occasions that the prohibition of Section 8(3) of the Act extends to any discriminatory discharge which is intended, or the purpose and effect of which is, to discourage membership in a labor organization,⁵ and the existence of a justifiable cause

⁴We are not confronted with the question of whether Benton's discharge would have been justified if the respondent had discharged him because his activities in behalf of a rank and file union were unlawful or to protect the respondent's neutrality. It did not assign such activities as a reason for his discharge at the time it occurred. Nor did the respondent claim in its pleadings or its evidence that it had discharged him for this reason. During the oral argument before the Trial Examiner, the respondent's counsel urged for the first time that to have permitted Benton to continue in its employ would have compromised its neutrality and subjected it to unfair labor practice charges. This was an obvious afterthought and not the reason for the discharge. We are not concerned with the question of whether a reason existed which could have been the basis of a non-discriminatory discharge. The issue here, as in all cases under Section 8(3), is whether the real reason for the discharge was to discourage membership in a labor organization.

⁵Matter of Air Associates, Inc., 20 N. L. R. B. 356, 375, enf'd as mod. 121 F. 2d, 586, (C.C.A. 2); Matter of Skinner and Kennedy Stationery Company, 13 N. L. R. B. 1186, enf'd 113 F. 2d, 667 (C.C.A. 8) where we found that the discharge of Foreman Eck-

for discharge is immaterial if it was not in fact the motivating cause for the discharge.

Upon the entire record we find that the respondent discriminated in regard to the hire and tenure of Benton's employment and thereby discouraged membership in the Union of its rank and file employees.

2. The Trial Examiner found that on December 22, 1945, when the respondent refused to bargain with the Union, the Union represented a majority of employees in the appropriate unit, and that the respondent's refusal to bargain violated Section 8(5) of the Act. Under the circumstances disclosed by the record, we cannot agree with the finding that the Union represented a majority and accordingly must dismiss the allegation of the complaint that respondent violated Section 8(5) of the Act.

The Trial Examiner's finding as to the Union's majority representation is based on authorization cards signed by five out of eight employees in the appropriate unit, and upon the employees' petition of December 18, 1944, which was signed by seven employees in the unit, designating the Union as the

ert reflected "an intention on the part of the employer to discourage its employees from aligning themselves with the Union." Cf. *Matter of Reliance Manufacturing Company*, 60, N. L. R. B. 946, where we found that a constructive discharge of a forelady because she refused to aid her employer in an anti-union campaign discouraged non-supervisory employees' membership in the Union; *Matter of Vail Manufacturing Company*, 61 N. L. R. B. 181; *Matter of Climax Engineer Co.*, 66 N. L. R. B., No. 141.

exclusive bargaining representative. While ordinarily we would recognize the designation by authorization cards as valid, we note that in the instant case the record shows that at the time these authorization cards were procured by the Union, Foreman Benton, who was in charge of the respondent's shop at Reno with the authority to hire and discharge, was actively engaged in union activities as a steward and trustee and influenced some of his subordinates to become members of the Union.⁶ Although the authorization cards were secured by Union Representative McKay rather than by Benton, and Benton's actual solicitation was apparently limited to a few employees, the unit is very small and it is impossible to determine the extent to which Foreman Benton's activities and solicitation were responsible for any employee's decision to join the Union, and

⁶Benton testified:

Q. You told these employees the Union was a good thing, they should join?

A. (Benton) I never told them they should join. We had a Union. If they wanted to join it, it was up to them, they were not forced.

Q. What did you tell them?

A. We had a Union. Most of them came in for the cure, if you know what I mean. They didn't join the Union, they didn't stay long enough. I didn't ask 90 percent to join. They didn't have the money to join.

Q. The other 10 percent you did ask to join?

A. Yes, and they joined. * * *

Q. You figured that your duty as a steward or trustee was to get the men in the Union?

A. The job of the steward is take up trouble with the Union between them and the agreement with the Company.

hence for the Union's paper majority. Since the Union's majority was procured with the direct and open assistance of a supervisory employee, it cannot be said to represent the free and untrammelled will of the employees and hence cannot be recognized as valid majority.⁷

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Wells, Inc., Reno, Nevada, and its officers, agents, or successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, or any other labor organization, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment;

(b) Threatening employees with economic reprisal because of their activities on behalf of the

⁷We refused to grant a petition in a representation case and direct an election where the record disclosed that the petitioning labor organization relied, in support of its claim of a substantial representation upon authorization cards secured with the assistance of a supervisory employee. Matter of the Toledo Stamping & Manufacturing Company, 55 N. L. R. B. 864; Cf. N. L. R. B. v. Dadourian Export Corporation, 138 F. 2d, 981 (C. C. A.-2).

above-named or any other labor organization;

(c) Interrogating employees concerning their membership or other activities in or on behalf of the above-named or any other labor organization;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Jack Benton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges;

(b) Make whole Jack Benton for any loss of earnings he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during such period;

(d) Post at its plant at Reno, Nevada, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the

Regional Director for the Twentieth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that the respondent refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in an appropriate unit.

Signed at Washington, D. C., this 12 day of June 1946.

PAUL M. HERZOG,
Chairman

JOHN M. HOUSTON,
Member,

[Seal]

NATIONAL LABOR RELATIONS BOARD.

Gerald D. Reilly, dissenting:

For the reasons hereinafter stated, I cannot accept the conclusion of the majority that the respondent discharged Foreman Benton because of its desire to discourage union membership and activities of its rank and file employees, and that the discharge was violative of Section 8(3) of the Act.

That Benton's discharge was not intended to discourage membership in the rank and file Union appears from the uncontroverted evidence showing that another foreman, who had authority to hire and discharge and who was a member of the same Union, was not discriminated against. Also, Benton's successor, at the time of his promotion to Benton's position, was a member of the same Union and his membership in the Union must have been known to the respondent. The respondent's hostility towards the Union, as shown by anti-union statements of its officials, also cannot provide a reasonable basis for the inference drawn by the majority. It was not so strong as to prevent them from entering into a collective bargaining agreement with the Union for the respondent's Luning division. The same officials entered into another collective bargaining agreement with the Union in behalf of one of the respondent's affiliates. The respondent also operated its Reno division, which is involved in this proceeding, under a collective bargaining agreement with the Teamster's Union covering its line drivers. Nor do I believe that the circumstance that Benton received no warning not to engage in his unlawful activities,

or that he was denied his request for demotion, or was not permitted to remain in his position at a normal salary, betrays an intent to discourage membership in the rank and file Union. What it might indicate is that the respondent intended to discourage any activities in behalf of the rank file Union by another foreman. But even assuming that indirectly Benton's discharge might have discouraged union membership and activities by removing from its ranks its most active member and also by discouraging membership in the Union by foremen, it still does not follow that the respondent could not terminate Benton's activities by discharging him, for, as it will be shown, they were activities prescribed by the Act.

While the record does not support the conclusion of the majority that Foreman Benton's discharge was due to discriminatory reasons, it furnishes ample support for the conclusion that, under the circumstances disclosed by the record, Benton's activities in behalf of the rank and file Union were activities proscribed by the Act, and that his discharge, therefore, was not violative of the Act. Since April 1943, and until his discharge on January 31, 1945, Benton was employed by the respondent as foreman in charge of its Reno shop. As such foreman, Benton directed and assigned work of "every man . . . in the shop." At the hearing, the parties stipulated that Benton had authority to hire and discharge his subordinates, that he had exercised that authority and excluded him from the bargaining unit. Of his union membership and activities the record discloses that Benton joined the Union in October 1943 and

did not relinquish his membership in the Union upon his promotion to the position of foreman. At the time of his discharge, Benton was one of the trustees of the union local and the union shop steward. He openly wore his union button at work most of the time. Benton also admitted that he talk to his subordinates about the Union and asked some of them to join the Union, and that he didn't ask the other employees to join because they didn't have money to join.⁸ Finally, Benton, was one of the first to sign the employees' petition of December 18, 1944, designating the Union as their bargaining representative.

That Benton's activities in behalf of the rank and file Union are proscribed by the Act is clear.⁹ They had a tendency to coerce the rank and file employees under his supervision in the exercise of their rights to self-organization. As a management representative, Benton possessed a power to hire, promote,

⁸See footnote 6 in the majority opinion.

⁹Had Benton's activities been in furtherance of self-organization and collective bargaining among supervisory employees, they would have been protected activities under the recent decisions of the Board. Benton, however, was engaged in activities in furtherance of organization of rank and file employees. Since Benton was a part of the management his conduct was attributable to his employer when it interfered with the rights of the rank and file employees to self-organization and collective bargaining. (Cf. Matter of Soss Manufacturing Company, 56 N. L. R. B. 348; Matter of American Steel Foundries, 67 N. L. R. B., No. 2.)

discharge, or alter the terms and conditions of their employment. Conscious of that power, these employees would normally be reluctant to refuse his suggestions to join the Union. Since Benton's activities constituted interference with the free choice of the respondent's employees, the respondent was bound to terminate Benton's activities in behalf of the rank and file union in any manner it deemed appropriate. Nor was there anything optional about this course of conduct. The respondent was under an affirmative duty to terminate coercive activities of its representative interfering with the employees' freedom to self-organization. And this is exactly what the respondent did.¹⁰ Such being the case, the respondent's motives for terminating Benton's unlawful activities by a discharge become entirely irrelevant. So long as the employer was doing only what the Act commanded him to do, i.e., to refrain from coercing his employees in the exercise of their right to self-organization, either directly or through his agents, the actual motivation for his conduct is beside the point.¹¹

¹⁰The record is clear that Benton's membership and activities in behalf of the rank and file union were known to the respondent's officials prior to his discharge. Indeed, at the December 22, 1944, collective bargaining conference respondent's President Wells told the union representatives that it was Benton who "was responsible for [the respondent's] employees being members of the Union and wishing to be represented by it."

¹¹While I agree with the majority that Benton's supervisory status did not relieve the respondent from its obligation not to discourage by discrimina-

Nor is the circumstance that Benton was never warned against engaging in activities in behalf of the rank and file union an indication that Benton's discharge was due to discriminatory motives and affected the respondent's right to discharge Benton. In my dissent in the American Steel Foundries case ¹² I had an occasion to deal with this particular question. I have pointed out in that case:

The Act imposes upon an employer a duty to refrain from interference in, or domination of, a labor organization of its employees and we have, since the beginning of our enforcement of the Act, imputed to the employers the responsibility for acts violative of this duty committed by supervisors. Such a "company policy" we have therefore found to be inherent in every employer's labor policy, re-

tion the membership in the rank and file union, the cases cited by the majority are distinguishable from the situation in the instant case in that there the employer had discriminated against the supervisory employee because of his refusal to comply with the employer's unlawful demand, such for instance, as a demand to assist the employer in his anti-union campaign (Matter of Reliance Mfg. Company, 60 N. L. R. B. 946, and Matter of Vail Mfg. Company 61 N. L. R. B. 181) or to relinquish supervisory employee's membership in the rank and file union, where such membership was retained for purposes of pension rights or transfer privileges (Matter of Climax Engineering Company, 66 N. L. R. B., No. 165). In the instant case, no such unlawful request was made by the respondent. Quite to the contrary, in terminating Benton's activities, the respondent only acted in compliance with the mandate of the Act.

¹²67 N.L.R.B. 2.

quiring no promulgation, publication or explanation.

It is for this reason that Foreman Benton must have presumed to know that his activities in behalf of the rank and file union were unlawful, jeopardized the neutrality of his employer and were in violation of his duties to the employer. No warning, therefore, was necessary to put Benton on notice that his conduct was both unlawful and disloyal to his employer.

Moreover, the respondent could have terminated Benton's activities in behalf of the rank and file union by discharging him also because they compromised its neutrality. The record shows that there was a jurisdictional dispute between the Union and its rival, the Teamsters' Union, both of whom claimed jurisdiction over the respondent's employees in certain classifications and that the respondent was informed by a representative of the Teamsters' Union that the respondent "will get into trouble if [it] negotiated with the Machinists . . . [in behalf of the disputed classifications]." Under these circumstances, it was perfectly natural for the respondent to accept the advice of its counsel and take measures for the protection of its neutrality thereby forestalling the probability of filing unfair labor charges.¹³ As the Board pointed out in the Soss case "the right under the Act of supervisors to protection in their organizational and

¹³Cf. *Matter of Soss Manufacturing Co.*, *supra*; *Matter of Climax Engineering Co.*, *supra*; *Matter of American Steel Foundries*, *supra*.

other concerted activities is not unqualified one, but is subordinate to organizational rights and freedom of rank and file employees, and to need of employer to maintain his neutrality." Since Benton has engaged in activities in behalf of the rank and file union in his capacity as a management representative, and since his activities were not protected by the Act, the respondent was at liberty to take any steps for the protection of its neutrality it alone deemed appropriate. The other alternative suggested by the majority in Matter of Climax Engineering Co. case, i.e., the scrutiny of the employer's conduct for the purpose of finding whether the measures taken from the preservation of his neutrality were or were not "appropriate measures," would be unjustified and constitute an unwarranted encroachment upon the prerogatives of the management.

The majority contends that we do not have to deal with the question as to whether Foreman Benton's discharge could be justified for the reason that his activities in behalf of the rank and file union were unlawful, since the respondent neither assigned to Benton, nor claimed either in the pleading or in its evidence that it discharged him for that reason. I disagree. The respondent's counsel did raise this question in his brief to the Board, in which he questioned the soundness of the Trial Examiner's conclusion in the following words: "We cannot believe that an employer cannot discharge or discipline an executive or foreman participating and soliciting union membership." The counsel

also asserted in his brief that such activities of a foreman would have subjected the respondent to the charges of unfair labor practices. During the oral argument before the Trial Examiner and in its brief to the Trial Examiner, the counsel for the respondent also argued that to have permitted Benton to remain in its employ, after it became aware that Benton was soliciting for the Union, would have comprised its neutrality and caused it to be liable for unfair labor practices. Counsel for the respondent also stated during the oral argument that he did so advise President Wells before Benton's discharge. Regardless, however, of the fact whether or not the issue was properly raised by the respondent, I am convinced that the majority opened it for a determination by rejecting the respondent's explanation for Benton's discharge and by imputing to the respondent a discriminatory motive in discharging Benton. Nor am I prepared to concede that it is the duty of an employer under all circumstances to disclose to the discharged employee the reason for his discharge.

Under broad implications of the decision reached by the majority, the principle of imputation to the employer of responsibility for the acts and statements of supervisory employees cannot longer prevail, if foremen are free to engage in activities in behalf of a rank and file union. By protecting the supervisory employees, who have authority to hire, discharge, and otherwise effect the tenure and conditions of employment, in their activities in behalf of the rank and file union, the majority has also

impaired the basic principle, essential for the preservation of employees' freedom to join a labor organization or select their bargaining representative of their choice.

Signed at Washington, D. C. this 12 day of June 1946.

GERARD D. REILLY,

Member.

National Labor Relations Board.

“APPENDIX A”

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act. we hereby notify our employees that:

We Will Not discourage membership in International Association of Machinists, or any other labor organization, by discharging or refusing to reinstate any of our employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not threaten our employees with economic reprisal because of their activities on behalf of the above-named or any other labor organization.

We Will Not interrogate our employees concerning their membership or other activities in or on

behalf of the above-named or any other labor organization.

We Will Offer to Jack Benton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

All our employees are free to become or remain members of the International Association of Machinists, or any other labor organization.

WELLS, INC.

Employer

By

Representative (Title)

Dated

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

WALLACE E. ROYSTER,
for the Board.

LOUIS H. CALLISTER,
of Salt Lake City, Utah, for the Respondent.

K. C. APPERSON,
of Oakland, Calif., for the Union.

INTERMEDIATE REPORT

Statement of the Case

Upon a first amended charge duly filed on August 9, 1945, by International Association of Machinists, affiliated with the American Federation of Labor, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Twentieth Region (San Francisco, California), issued its complaint on August 9, 1945, against Wells, Inc., Reno, Nevada, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and the first amended charge, together with notice of hearing thereon,

were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent (1) on or about May 16, 1944, and at all times thereafter, and specifically on October 5 and December 22, 1944, refused to bargain collectively with the Union as the exclusive representative of its employees in a certain appropriate unit, although a majority of its employees in the said unit had designated the Union as their representative for such purpose; (2) during December 1944 and January 1945, (a) disparaged the Union, (b) ordered its employees to refrain from discussing the Union in the shop, (c) discriminatorily refused to allow a representative of the Union upon its premises, (d) threatened to move its plant from Reno, Nevada, to Salt Lake City, Utah, (e) questioned its employees with respect to their membership in the Union, and (f) ridiculed one of its employees for wearing a union button; (3) on January 31, 1945, discharged Jack Benton, and thereafter refused to reinstate him, because of his membership and activity in behalf of the Union; and (4) by the foregoing acts and conduct, interfered with, restrained, and coerced its employees in the rights guaranteed in Section 7 of the Act.

The answer duly filed by the respondent on August 20, 1945, admitted all the allegations of the complaint pertaining to the corporate existence of the respondent and the nature, character, and extent of the business transacted by it and certain

other factual matters, but denied the commission of unfair labor practices.

Pursuant to notice, a hearing was held on August 24 and 25, 1945, at Reno, Nevada, before the undersigned Trial Examiner, Howard Myers, duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel; the Union by a representative. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. At the conclusion of the hearing, Board's counsel moved to conform the pleadings to the proof with respect to minor matters, such as correction of typographical errors, misspelling, and the like. The motion was granted without objection. Oral argument, in which counsel for the Board and for the respondent participated, was heard at the conclusion of the taking of the evidence and is part of the record. A brief was filed by the respondent.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of the respondent

Wells, Inc., a Nevada corporation, has its principal office and place of business in Reno, Nevada,¹

¹The respondent also operate plants at Luning, these plants, however, are not involved in the pro-Nevada, and at Elko, Nevada. The employees of ceeding herein.

where it is engaged in the transportation of freight between the States of Nevada and California. During the 12-month period ending June 30, 1945, the respondent transported 194,577 tons of freight, 72.8 per cent of which was transported in interstate commerce.

The respondent concedes that during all the times material herein, it was, and still is, engaged in commerce within the meaning of the Act.

II. The organization involved.

International Association of Machinists, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the respondent.

III. The unfair labor practices.

A. The refusal to bargain collectively.

1. The appropriate unit.

At the hearing, the parties stipulated, and the undersigned finds, that all the mechanics, mechanic helpers, and mechanic apprentices employed by the respondent at its Reno, Nevada, shop, excluding grease men and all supervisory employees with authority to hire, promote, discharge, or effectively recommend such action, constitute a unit for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

The parties at the hearing stipulated that eight named persons whose names appear upon the respondent's pay roll of December 15, 1944, should be included in the unit as coming within the above

description.² Board's counsel maintained that, in addition to these eight, E. S. Casinella, C. H. McBride, and R. H. Wilson should also be included in the unit. The respondent contended that they should be excluded. The credible evidence clearly shows that on December 15, 1944, Casinella was and at all times thereafter has been, a foreman with authority to hire and discharge and that he exercised that authority on various occasions. Regarding McBride and Wilson, Jack Benton, their foreman and the Union's shop steward, testified, and the undersigned finds, that McBride, during all the times material herein, was a blacksmith's helper and that he did very little mechanical work, and that 70 to 80 per cent of Wilson's time was devoted exclusively to mechanical work. Under the circumstances, the undersigned finds that Wilson should be included in the unit and McBride and Casinella excluded.

2. Representation by the Union of a majority in the appropriate unit.

A list prepared by the respondent, and introduced in evidence by Board's counsel, contains the names of all the persons in the respondent's employ

² Namely, A. B. Gandrud, G. W. Hollenback, C. Haverland, Oran Ellis, Ralph Mudge, E. F. Staats, S. E. Tower, and Albert McFadden. The December 15, 1944 pay roll was agreed upon because it became evident at the hearing that the refusal to bargain took place on December 22, 1944, if at all. It was also stipulated by the parties that the persons whose names appeared on the December 15, 1944 pay roll and who were in the appropriate unit, were still in the respondent's employ. on December 22, 1944.

on December 15, 1944, in the unit hereinabove found appropriate. The parties stipulated at the hearing, and the undersigned finds, that these persons were still in the respondent's employ and were performing the same work on December 22, 1944. On behalf of the Board there were offered and received in evidence 11 signed cards expressly authorizing the Union to represent the signers for collective bargaining. The authenticity of the signatures on the cards was not challenged.

The undersigned has compared the names appearing on the cards with the list submitted by the respondent and received in evidence as a Board exhibit and finds that, as of December 15, 1944, five employees in the appropriate unit had, on that date, signed cards designating the Union as their collective bargaining representative.³ Furthermore, there was also received in evidence a petition, dated December 18, 1944, reading as follows:

TO WHOM IT MAY CONCERN

We, the under-signed, employees of Wells, Inc. Reno, Nevada, do here-by authorize the International Association of Machinists A. F. of L. Local 801, known as the Machinists Union, to act as our sole bargaining agent in all matters pertaining to wages and working conditions.

This petition bears the signatures of seven persons in the appropriate unit. The authenticity of

³ Three signed authorizations on June 3, and two on October 4, 1944.

these signatures was not questioned.⁴ The undersigned accordingly finds that on December 15, 1944, and at all times thereafter, the Union was the duly designated collective bargaining representative of the respondent's employees in the unit found to be appropriate. Pursuant to Section 9(a) of the Act, the Union was, therefore, the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, hours of employment, and other conditions of employment.

3. The refusal to bargain.

On May 16, 1944, after T. E. McShane and Glen Anderson, representatives of the Union, and J. W. Wells, the respondent's president, had concluded the execution of a collective bargaining contract covering the employees of Wells Cargo, Inc., a corporation owned and operated by the stockholders and officers of the respondent, McShane requested Wells to enter into a similar contract covering the respondent's Reno employees. After a brief discussion of the provisions of the contract, during which discussion Wells stated that the respondent would be unable to pay the wages granted the Wells Cargo, Inc., employees,⁵ and that the unit was not appropriate, the parties agreed to meet and confer at a later date. Before the meeting concluded,

⁴ This petition was offered in evidence by the respondent.

⁵ The plant of Wells Cargo, Inc., is located at Las Vegas, Nevada.

however, McShane pointed out to Wells that the unit sought for the Reno employees was the same unit agreed to in the contract just executed.⁶

On August 8, 1944, McShane sent the following letter to Wells at his Las Vegas offices:

This communication serves as notice that Lodge No. 801, International Association of Machinists, Reno, Nevada represents the Mechanics employed by you in both of your Reno shops, and hereby request that you meet with our Representatives for the purpose of negotiating an agreement between your Company and Lodge No. 801, covering the employees performing work coming under the jurisdiction of the Internatitonal Association of Machinists.

All of the above mentioned employees are represented by Lodge No. 801 and we will submit proof of this representation at the first meeting with you.

I was informed by Mr. Howard Wells, of your Company that you would not be in Reno for some

⁶Sections A and B or Article I of the Wells Cargo, Inc. read as follows:

Section A

The company recognizes the Union as the sole collective bargaining agency for all employees performing work which comes under the jurisdiction of the I. A. of M.

Section B—Machinists Jurisdiction

The company recognizes the jurisdiction of the Machinists as that contained in the Constitution of the International Association of Machinists, effective April 1, 1942, between pages V and X, inclusive.

time to come, but that your duties would require your presence in Las Vegas, and suggested that I contact you in regards to this matter, as you are the only one who has authority to decide matters of this kind.

I talked to some of your mechanics and it is my opinion that it will be to the best interests of all concerned to have this agreement signed as soon as possible.

In view of your inability to come to Reno, I will meet you in Las Vegas, at your earliest convenience, if you can meet me Monday or Tuesday of next week at Las Vegas, advise by mail, to T. E. McShane, 1115 Sierra St. Reno, Nevada, c/o Geo. E. McKay, Secretary Lodge No. 801, I. A. of M.

The respondent did not answer this letter. Wells testified at the hearing that he did not see the letter until his return from his vacation some time in September.

In the latter part of September, McShane and George McKay, the financial secretary and business agent of the Union's Reno, Nevada, local, called upon Howard Wells and his brother, Robert, the respondent's vice-president and secretary respectively. There McShane presented to the Wells brothers a copy of the Wells Cargo, Inc., contract and stated that the Union would like to enter into a similar contract covering the respondent's Reno employees. The meeting concluded when one of the Wells brothers stated that his brother, J. W. Wells, was the only one with authority to negotiate

a collective bargaining contract and that McShane should see him.

On October 4, McShane and Anderson again met with J. W. Wells at the offices of Wells Cargo, Inc. There McShane presented Wells with a copy of the Wells Cargo, Inc. contract and again asked him to enter into a similar contract for the respondent's Reno employees. McShane also presented Wells with authorizations signed by the respondent's Reno employees designating the Union as the collective bargaining representative. After reading the authorizations, Wells stated, "Hell. you've got everybody on there but me." After some discussion, Wells stated that he was agreeable to all the provisions of the proposed contract except the provision respecting overtime rates and that since the respondent's operations came under the jurisdiction of the Interstate Commerce Commission the respondent need not, and would not, pay overtime rates for work performed over 40 hours per week. McShane then showed Wells certain signed contracts which the Union had with other trucking companies in the vicinity of the respondent's shop wherein the companies contracted to pay overtime rates for all work performed over 40 hours per week. After reading these contracts, Wells stated, to quote the credible testimony of McShane, "Well, the boys in Reno are going to have to operate that business. I am not going to tie them up to any conditions without them being in on the deal. I will meet you in Reno in about ten days and at that time in company with Bob and Howard we will

resume negotiations." McShane then told Wells that the unit sought by the Union consisted of all the persons "doing mechanical work in the body shop as mechanics" and that the Union was willing to change the "Machinist Diesel specialist" classification, to which Wells had objected, to "automotive machinist." Wells, while not specifically agreeing to the suggested change, stated that he would discuss the change with McShane at a later meeting.

At the conclusion of the meeting, McShane went to Reno to await word from J. W. Wells. Not hearing from him, McShane, on October 30, 1944, telegraphed him as follows:

Important That You Meet Me Here at Once.
Wire When You Can Be Here.

Several days later, Wells replied:

You Promised at Least Ten Days Notice Before Meeting Impossible to Get Away for at Least Two Weeks Will Be in Inyokern Salt Lake City and Denver in the Meantime Will Contact You When Available.

Upon the receipt of Wells' telegram, McShane telegraphed the Conciliation Service of the United States Department of Labor requesting that a conciliator be sent for the purpose of adjusting the matter between the Union and the respondent. On or about November 8, a conciliator conferred separately with the parties but nothing was accomplished. On December 22, a conciliator met with the parties and, according to McShane's credible

testimony, the following transpired at that meeting:

Q. Will you give us your recollection of these conversations?

A. Mr. Curtin, Commissioner Curtin informed the Wells the purpose of calling them and discussion started between Mr. Joe Wells and myself, and I don't recall the discussion word by word, but the things that were discussed was at that time that Mr. Wells then brought up the question "Do you represent the people?"

We again referred to the authorizations from their employees and Mr. Wells, after studying a while, said, "Well, I guess I will go ahead and negotiate." Which we proceeded to do. However, after discussing, I would say failing to agree on various articles that he had agreed to in Las Vegas, Mr. Wells, at this December 22nd meeting, demanded that we submit a new agreement with an open shop clause and without the overtime clause where it applied to 40 hours and 8 hours per day, and also the rate of pay, and at that time he asked me again what unit we petitioned for, and at that time I told him that we still petitioned for the same unit that we had told him about in Las Vegas on October 5th, which would be mechanics, automotive machinists, and welders, the helpers of all classifications, and all the employees in the body shop that were doing mechanical work we considered were all of the employees.

Q. Did Mr. Howard Wells or Mr. Joe Wells or any of the Messrs. Wells who were present make any comment about that unit?

A. Sometime shortly after the meeting started, Mr. Howard Wells got up and left the room. He was gone for a period of time, I do not know the exact period that he was gone for, but in a little while he came back and came into the room and called Mr. Joe Wells out of the room, and Mr. Joe Wells went out of the room and they were gone possibly a half hour, maybe not that long. They were gone quite a little while and during their absence Mr. Curtin got up and walked the floor and said he thought that was a little unusual, he couldn't imagine what they were doing, one thing and another. He seemed to be a little dissatisfied about being put on the spot there.

Mr. Callister (Respondent's Counsel): Just state the conversatiton.

Q. By Mr. Royster (Board's Counsel): Just what occurred in the presence of the Wells?

A. Mr. Joe Wells came back and said that they had been out and talked to their employees. They found out that some of them didn't wish the Union to represent them and that they would not at that time recognize us as representing his employees, but would demand an election before they would go any further.

Trial Examiner Myers: Then what happened?

The Witness: The argument broke out over again, the Commissioner who was conducting the case stated that he thought the authorizations looked authentic and I think he suggested, in fact I know he suggested that they continue with the negotiations, that the actions of the Wells brothers

in going out and talking to their employees at that time was rather unbecoming and he suggested that we continue with the negotiations. The Wells brothers refused to do so and at that time they brought up the question of Jack Benton again. Their contention was that Jack Benton was a foreman. The Union's contention was that Jack Benton was a mechanic by the fact that while he did do some of his duties which were of a supervisory nature, that the majority of the duties performed by Jack Benton were that of a journeyman mechanic and he worked with the tools the majority of his time.

The Wells stood on their contention that he was a supervisory employee and did not belong in the Union. One discussion brought on another one and Joe Wells made the statement that Jack Benton was responsible for his employees belonging to the Union, that during the lunch hour he talked it to all the employees, talked Union to the employees during the lunch hour and that Mr. Benton was a first class foreman, he did a good job for them and that his work was satisfactory in every way but he still felt that he was the one that was responsible for their employees being members of the Union and wishing to be represented by it.

Q. Was there anything in any of the conversations about Salt Lake City?

A. Mr. Wells stated at one time——

Q. (Interposing) Which Mr. Wells was this?

A. Mr. Joe Wells.

Q. All right.

A. Mr. Joe Wells stated that before that they would submit to any of the conditions that we asked for that he would move his operation to Salt Lake City.

Q. Do you have any present recollection of anything else that occurred at this meeting?

A. At this time I can't recall anything further that transpired at that meeting.

It is apparent from the foregoing facts that the Union on May 16, 1944, and on several occasions thereafter, requested the respondent to bargain collectively. It is equally apparent that the respondent each time sought to postpone negotiations, and on December 22, 1944, admittedly refused to recognize the Union as the exclusive collective bargaining representative of the respondent's employees. The Act requires an employer to bargain, upon request, with the representative designated by a majority of his employees, unless, as the Board and the Courts have held, the employer in good faith questions the appropriateness of the claimed unit or the majority status of the representative, and the representative, upon request, fails satisfactorily to show by some reasonable method that it represents a majority of the employees in the appropriate unit. But if the claimed representative in fact represents a majority of the employees in the appropriate unit, the employer has the burden of proving that he raised the question in good faith and that the representative failed to show its majority status. This burden the respondent has failed to discharge. The facts, on the other hand, indicate bad faith on its

part. The Union submitted proof of its majority status to J. W. Wells, who exclaimed upon examining it "Hell, you've got everybody on there except me." Although the respondent at several of the conferences appeared to be advancing bona fide doubts as to the appropriateness of the unit, the undersigned cannot consider those conferences as isolated instances but must regard them in relation to all other factors in the case. Consideration of the sequence of events in the preceding paragraphs when viewed against the background of anti-union statements and activities, as set forth herein, leads the undersigned to conclude that the respondent followed a plan calculated to eliminate the Union as the collective bargaining representative of the employees. The undersigned is satisfied from the events occurring up to and including January 31, 1945, the date when, as found below, Jack Benton was discriminatorily discharged, that the respondent, on May 16, 1944, and thereafter had no genuine intention of recognizing or dealing with the Union, but instead sought to thwart the Union's organizational plans. The undersigned further finds that the respondent's questioning of the appropriateness of the unit was not advanced in good faith, but was used to delay the Union's recognition as the collective bargaining representative of the respondent's employees. Upon the entire record in the case, the undersigned finds that on December 22, 1944, and at all times thereafter, the respondent refused to bargain collectively with the Union as the representative of the respondent's employees in the ap-

propriate unit and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

B. Interference, restraint, and coercion; the discriminatory discharge of Jack Benton.

Benton was first employed by the respondent as a mechanic on August 17, 1942, at a salary of \$250 per month. About the middle of April 1943, he was promoted to foreman and his salary was raised to \$325 per month. About 6 or 8 months thereafter his salary was raised to \$350 per month. On January 1, 1945, his salary was raised to \$375 per month.

About the beginning of December 1944, H. B. Divine became shop superintendent. Upon assuming his duties as superintendent, Divine was introduced to Benton by Howard Wells, who told Divine, in Benton's presence, that Benton has been "cooperating" with Robert Wells "100 per cent."

Sometime in January 1945, Benton approached Divine and the following conversation between them ensued, according to the credible testimony of Benton:⁷

Well, I told him [Divine] that I would like to talk to him about the foreman job. I said, "There's mechanics getting \$350 a month and I am getting \$375 a month, and I am on call 24 hours a day. I take the dirtiest part of the road work on the mountain, I never put the dirty one off and take the good ones." And I said, "I wonder if you get

⁷Divine's version of what was said during this conversation is substantially the same as Benton's.

me a little more money. There is not enough difference between the mechanics and myself. I come down here and get held up and work overtime and they work 8 hours a day, six days a week, for \$350, and I work 6 days a week and overtime and I just get \$25 more than they do and I wondered if I could get some more money." If that wasn't satisfactory, I wondered if he could get another foreman and give me a job back as a mechanic. In fact, we had talked about just indirectly of me going back to night shift. We were having quite a little bit of trouble and fellows, we didn't have the qualified men, and he said, "Well, I will see what I can do." And he said, "I think everything can be arranged and don't worry."

Divine made no effort to obtain an increase in salary for Benton. Instead he discharged Benton on January 31. At the time of Benton's discharge the following took place, according to Benton's credible testimony:⁸

... Mr. Divine called me over to one side and I walked over, and he said to me, he said, "Well, Jack, I guess you will be relieved of your shop foreman duties." And I said, "Why, that is just fine." I said, "It wasn't worth it anyway. The mechanic job is best." And I said, "What shift do you want me to work?" And he said, "Well, I don't think it would work out, Jack, if I put you on another shift as a mechanic. I have worked in

⁸Divine's version of this conversation is likewise substantially the same as Benton's.

shops and I have run men and I have seen it tried and it hasn't worked." And he said, "I don't think it would work out."

I says, "Well, I worked for Mr. Richer⁹ and I think I can work for you." And he said, "Well, I don't think it would." And I said, "In other words, you mean that I am fired?" And he said, "If you look at it that way, yes." And I said, "Thank you." That is all there was.

Benton was one of the most active members of the Union. He was one of its trustees and a shop steward. His membership and activity were well known to the respondent. According to the undenied and credible testimony of McShane, J. W. Wells said at the December 22 meeting that Benton was a first class foreman, that he did a good job for the respondent, that his work was satisfactory in every way, but that Benton "was the one that was responsible for [the] employees being members of the Union and wishing to be represented by it."¹⁰ Furthermore, Robert Wells, in a conversation with Benton in December 1944, which was held in the presence of the other employees on the day shift, said, according to Benton's undenied and credible testimony, "Unions were lousy, Unions would keep a good man down and promote a sorry man." On

⁹Richer was the superintendent whom Divine replaced. Benton worked as mechanic and as foreman under Richer.

¹⁰At no time was Benton requested by any official of the respondent to discontinue his Union membership or activity because of his supervisory status.

another occasion in December 1944, Robert Wells asked Benton what that yellow thing was on his sweater, adding, "Did a bird fly over you?" Benton replied, "No, it's a Union button, the men wear them." The respondent's antipathy for the Union is also clearly shown by Robert Wells' action in ordering George McKay out of the shop in December 1944, when the latter went there to collect dues from the employees during lunch hour. This treatment of McKay was, according to the undenied and credible evidence, directly opposite to that afforded representatives of other unions when they went into the shop to collect dues.

During the oral argument at the end of the hearing, and in its brief, respondent urged that to have permitted Benton to remain in its employ after it became aware that Benton was soliciting for the Union, would have compromised its neutrality and caused it to be liable for unfair labor practices. But it is clear from the evidence that this was not the motivating factor which led to Benton's discharge. It is significant, in this connection, that at no time was Benton warned that failure to discontinue these activities might result in discipline or discharge, nor was any order or advice given Benton to discontinue them. It is hardly likely that it would have failed to indicate its position in the matter to Benton had it been concerned in the manner it now urges. On the contrary, its antipathy to the Union, as reflected by the facts herein found, indicates that what it objected to was the union activity as such. Under these circumstances the respondent's argument on the point fails.

The respondent's contention that it would have adversely affected Benton's and the other employees' morale if the respondent had reduced Benton to the status of a non-supervisory employee in accordance with his request is not supported by the record. The undersigned is convinced and find that Benton was discharged on January 31, 1945, because he was a member and active in behalf of the Union and for no other reason. The undersigned further finds that by making the anti-union statements set forth above, by questioning the employees regarding their union affiliations, by discharging Benton,¹¹ and by refusing to bargain collectively with the Union as the representative of its employees, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce.

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to the trade, traffic, and commerce between the several States, and such of them as have been found to be unfair practices tend to lead to labor disputes

¹¹As the Circuit Court of Appeals for the Seventh Circuit in *N.L.R.B. v. Automotive Maintenance Machinery*, 116 F. (2d) 350, 353 observed: "No more effective form of intimidation nor one more violative of N.L.R. Act can be conceived than discharge of an employee because he joined a Union . . ."

burdening and obstructing commerce and the free flow of commerce.

V. The remedy.

Having found that the respondent has engaged in unfair labor practices, the undersigned will recommend that the respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the respondent has discriminated in regard to the hire and tenure of employment and the terms and conditions of employment of Jack Benton by discharging him on January 31, 1945, the undersigned will recommend that the respondent offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority and other rights and privileges. The undersigned will further recommend that the respondent make Jack Benton whole for any loss of earnings he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount he would have normally earned as wages from the date of the respondent's discrimination against him to the date of the respondent's offer of reinstatement, less his net earnings¹² during that period.

¹²By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but

Having found that the respondent refused to bargain collectively with the Union on December 22, 1944, it will be recommended that the respondent, upon request, bargain collectively with the Union as the exclusive representative of all the employees in the unit heretofore found appropriate.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Association of Machinists, affiliated with the American Federation of Labor, is a labor organization, within the meaning of Section 2(5) of the Act.

2. All mechanics, mechanics helpers, and mechanic apprentices employed by the respondent at its Reno, Nevada, shop, excluding grease men and all supervisory employees with authority to hire, promote, discharge, discipline, or effectively recommend such action constituted, and now constitutes, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act.

3. International Association of Machinists was

for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company*, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7.

on December 15, 1944, and at all times thereafter, the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

4. By refusing on December 2, 1944, and at all times thereafter, to bargain collectively with the International Association of Machinists, as the exclusive representation of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8(5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of Jack Benton, thereby discouraging membership in International Association of Machinists, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8(3) of the Act.

6. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the respondent, Wells, Inc., Reno, Nevada, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, affiliated with the American Federation of Labor, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to the hire or tenure of employment or any term or condition of employment.

(b) Refusing to bargain collectively with International Association of Machinists, affiliated with American Federation of Labor, as the exclusive representative of all the respondent's mechanics, mechanic helpers, and mechanic apprentices employed by the respondent at its Reno, Nevada, shop, excluding grease men and all supervisory employees with authority to hire, promote, discharge discipline, or effectively recommend such action;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist the International Association of Machinists, affiliated with American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of this Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act.

(a) Upon request bargain collectively with International Association of Machinists, affiliated with American Federation of Labor, as the exclusive representative of all the mechanics, mechanic helpers, and mechanic apprentices employed by the respondent at its Reno, Nevada, shop, excluding grease men and all supervisory employees with authority to hire, promote, discharge, discipline, or effectively recommend such action;

(b) Offer to Jack Benton immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority and other rights and privileges in the manner set forth in "The remedy";

(c) Make whole, in the manner set forth in "The remedy," Jack Benton for any loss of earnings he may have suffered by reason of the respondent's discrimination against him;

(d) Post at its Reno, Nevada, shop, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the Twentieth Region shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the receipt of this Intermediate Report what steps respondent has taken to comply therewith.

It is further recommended that unless on or before ten (10) days from the date of the receipt of this Intermediate Report, respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective July 12, 1944, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue

orally before the Board request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

Dated: October 17, 1945.

/s/ HOWARD MYERS,
Trial Examiner.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss

of pay suffered as a result of the discrimination. Jack Benton.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is all mechanics, mechanic helpers, and mechanic apprentices employed by the respondent at its Reno, Nevada, shop, excluding grease men and all supervisory employees with authority to hire, promote, discharge, discipline, or effectively recommend such action.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

WELLS, INC.

(Employer)

Dated..... By.....
(Representative) (Title)

Note:

Any of the above-named employees presently serving in the Armed Forces of the United States will be offered full reinstatement upon application in

acordance with the Selective Service Act after discharge from the Armed Forces.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

AFFIDAVIT AS TO SERVICE

District of Columbia, ss:

I, Edward J. McGovern, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 12th day of June, 1946, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Decision & Order [and Intermediate Report] to the following-named persons, addressed to them at the following addresses:

Louis H. Callister, Esquire, 619 Continental Bank Building, Salt Lake City, Utah.

International Association of Machinists, Union No. 801, Att. Mr. K. C. Apperson, 306 Pacific Building, Oakland, California.

/s/ EDWARD J. McGOVERN

Subscribed and sworn to before me this 12th day of June, 1946.

/s/ MERLE J. SMITH

Designated Agent for the National Labor Relations Board.

(Signed Post Office return receipts No. 69873 and 69874 attached.) [32]

Before the National Labor Relations Board
Twenties Region
No. 20-C-1306.

In the Matter of:

WELLS, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS.

U. S. ATTORNEY'S OFFICE
Third Floor, Post Office Building
Reno, Nevada

Friday, August 24, 1945.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 a. m.

Before:

Howard Myers, Esq., Trial Examiner.

Appearances:

WALLACE E. ROYSTER, Esq., San Francisco, California, appearing on behalf of the National Labor Relations Board.

K. C. APPERSON, 306 Pacific Building, Oakland, California, International Representative, appearing on behalf of Machinists Union #801, the Charging Union.

LOUIS H. CALLISTER, Esq., 619 Continental Bank Building, Salt Lake City, Utah, appearing on behalf of Wells, Inc., the Respondent.

PROCEEDINGS

Trial Examiner Myers: I would like to announce that this is a formal hearing before the National Labor Relations Board in the matter of Wells, Inc., and International Association of Machinists, Case No. 20-C-1306.

The Trial Examiner appearing for the National Labor Relations Board is Howard Myers. Will counsel please state their appearances for the record?

Mr. Royster: Wallace E. Royster, 1095 Market Street, San Francisco, for the Board.

Mr. Apperson: K. C. Apperson, 306 Pacific Building, Oakland, California, for the Machinists.

Trial Examiner Myers: Are you an attorney, Mr. Apperson?

Mr. Apperson: No.

Trial Examiner Myers: Just a representative?

Mr. Apperson: That is all.

Trial Examiner Myers: International Representative?

Mr. Apperson: That is right.

Mr. Callister: Louis H. Callister, Attorney-at-Law, Continental Bank Building, Salt Lake City, Utah, for the Respondent, Wells, Inc.

Trial Examiner Myers: Any other appearances to be noted?

I would like to announce further that the Official Reporter makes the only official transcript of these [3*] proceedings. Citations in briefs or arguments

* Page numbering appearing at top of page of original certified Transcript of Record.

based upon the record directed to the Trial Examiner or to the Board must cite the official transcript in all references to the record. The Board will not certify any transcript other than the official transcript in any court litigation.

It may become necessary to make corrections in the record during the hearing. If so, the party desiring the correction will submit the suggested correction to the other parties in writing. When this has received their written approval, it will be submitted to the Trial Examiner. In the event the parties are unable to agree upon proposed corrections, the Trial Examiner will then consider motions to correct the record or may, upon his own motion, order certain corrections made. If the parties have been unable to agree upon such corrections before the close of the hearing but have entered into a written stipulation concerning such matters after the close of the hearing, but before the transfer of the case to the Board, such stipulations or motions must be addressed to the Trial Examiner in care of the Chief Trial Examiner in Washington. After the transfer of the case to the Board, all such communications should be directed to the Board itself.

Concise statements of reasons for motions or objections will be permitted, but the Trial Examiner may go off the record for the purpose of hearing extended argument. Off-the-record [4] discussion or argument will not be included in the official transcript unless an order to that effect be

made by the Trial Examiner, either upon the request of any of the parties or upon his own motion. All requests to go off the record are to be directed to the Trial Examiner, not to the Official Reporter.

The Trial Examiner will allow an automatic exception to all adverse rulings and upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

Five copies of all pleadings submitted during the hearing are to be filed with the Trial Examiner.

All exhibits offered in evidence shall be in duplicate.

At the close of the hearing I will expect counsel to argue orally during which argument I will feel free to discuss with and ask questions of counsel with respect to their contentions as to the issues, the facts, and the legal principles involved. The oral argument will be included in the stenographic report of the hearing.

Any party shall be entitled upon request made before the close of the hearing to file a brief with the Trial Examiner within five days of the close of the hearing unless the time is extended by the Trial Examiner. Five copies of such briefs shall be directed to the Trial Examiner in care of the Chief Trial Examiner in Washington. [5]

During the course of the hearing I will undoubtedly ask questions of the various witnesses. I want counsel to feel free to object to any of my questions if they think the questions are improper in the

same manner and with the same freedom as if the questions were propounded by counsel.

You may proceed, Mr. Royster?

Mr. Royster: Mr. Examiner, I have to offer in evidence initially the formal pleadings in this case, and do offer as Board's Exhibit 1(a), the first amended Charge; Exhibit 1(b), the Complaint; Exhibit 1(c), the notice of hearing; Exhibit 1(d), the affidavit of service of the notice of hearing, and Complaint; and Board's Exhibit 1(e), the Answer filed by the Respondent.

(Thereupon the documents above referred to were marked Board's Exhibits Nos. 1(a), through 1(e), inclusive, for identification.)

Trial Examiner Myers: Any objections to those papers going into evidence?

Mr. Callister: No objection.

Trial Examiner Myers: There being no objections, the papers are received in evidence, and I will ask the Reporter to please mark them as Board's Exhibits 1(a) through 1(e), inclusive.

(The documents heretofore marked Board's Exhibits Nos. 1(a) through 1(e), inclusive, for identification, were received in evidence.) [6]

Mr. Royster: Mr. Examiner, prior to the opening of the hearing counsel for the parties have entered into a tentative stipulation on the commerce aspects of this case which I now offer.

It is hereby stipulated among counsel for the Re-

spondent, counsel for the Charging Union, and counsel for the Board——

Mr. Callister: (Interposing) Is the Union a part of this stipulation?

Mr. Royster: Yes.

Trial Examiner Myers: That is by Mr. Apperson, the International Representative?

Mr. Royster: Yes.

(Continuing)——that during the year ending June 30, 1945, Wells, Inc., transported a total of 194,577 tons of freight, of which 72.8 per cent was interstate. The gross revenue for hauling this freight amounted to \$657,034.

In the conduct of its business the Respondent uses approximately 50 trucks.

Trial Examiner Myers: Do you so stipulate?

Mr. Callister: I do so.

Trial Examiner Myers: Mr. Apperson?

Mr. Apperson: I so stipulate.

Trial Examiner Myers: And you, Mr. Royster?

Mr. Royster: I do.

Trial Examiner Myers: Any other stipulations? [7]

Mr. Royster: I have two exhibits which may go in by stipulation, Mr. Examiner. Payroll records furnished counsel for the Board by the Respondent prior to the hearing.

Mr. Callister: Just a minute, Mr. Royster, is this the proper time to put those in? I do not want to object to them unless I find it necessary.

Now, we have given Mr. Royster certain docu-

ments. We have no objection to them as to the fact those are our figures. The only thing that comes in my mind is that I may find some objection to the presentation of the documents for the purpose for which they may be presented.

Now, at this time, Mr. Examiner, I do not know the purpose for which Mr. Royster has to present these documents so I would have to object to them at this time. I do not care to do so. I think if they were presented at the proper time I would have no objection.

Mr. Royster: I can make a statement now in that respect.

The purpose of these payrolls is to show the employees of Wells, Inc., in the shop at Reno on certain dates, the first date being May 15, 1944; the second, October 5, 1944; and the third, December 22, 1944.

Now, it is the purpose of the Board, the expectation of counsel for the Board, to show, predicated upon these payrolls records, that the Union on those dates represented a majority of the shop employees. [8]

Mr. Callister: Now, I think there is a proper time and proper place to introduce those, and I do not think it is proper at this time because I think the foundation should be laid before they will be put in. I will not stipulate to them at this time. I will at the proper time.

Trial Examiner Myers: You cannot offer them if no foundation is laid unless you have a stipula-

tion. Mr. Callister does not want to stipulate at this time.

Mr. Callister: It is not because I want to be arbitrary, not at all.

Trial Examiner Myers: I know what you have in mind, at least I think I do.

Mr. Royster: It strikes me, Mr. Examiner, that that puts me to placing Mr. Wells on the stand and introducing these payrolls through him.

Trial Examiner Myers: Well, that is for you to figure out.

Mr. Royster: All right, sir.

Trial Examiner Myers: Off the record.

(Discussion off the record.)

Trial Examiner Myers: On the record.

Are there any motions addressed to the pleadings?

Mr. Callister: We have none at this time, Mr. Examiner. However, I would like this reservation, if I may, that if something should develop during the hearing that I am not [9] aware of now, I would like to reserve our motions to the end, if I may. I put this on this basis rather than interrupt during the course of this trial or hearing, I would like the opportunity at the end to make whatever motions that I would desire to make that should be in order at the beginning, but if I may reserve them to the last.

Trial Examiner Myers: Very well, sir.

Will you call your first witness, Mr. Royster, please?

Mr. Royster: Mr. Apperson.

K. C. APPERSON

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: K. C. Apperson.

Trial Examiner Myers: Where do you live?

The Witness: 1332 Yale Avenue, Stockton, California.

Trial Examiner Myers: You may proceed, Mr. Royster.

Mr. Callister: Is there anything we can stipulate to?

Mr. Royster: Approve the labor organization.

Mr. Callister: We will so stipulate.

Mr. Royster: I will offer the stipulation then.

Mr. Callister: I wish you would tell me ahead of time and I will tell you whether I agree to it or not. [10]

Mr. Royster: Before the hearing opened I sug-

(Testimony of K. C. Apperson.)

gested this to you and you thought you were not willing to stipulate. The stipulation I had proposed, perhaps you misunderstood, was that the International Association of Machinists is a labor organization within the meaning of the National Labor Relations Act.

Mr. Callister: We will so stipulate.

Mr. Royster: We so tipulate.

Trial Examiner Myers: Do you want this witness?

Mr. Royster: No.

Trial Examiner Myers: Do you have any questions, Mr. Callister?

Mr. Callister: No, we have none.

Trial Examiner Myers: You are excused, Mr. Apperson.

(Witness excused.)

Trial Examiner Myers: Call your next witness, Mr. Royster.

Mr. Royster: Mr. Jack Benton.

JACK C. BENTON

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

(Testimony of Jack C. Benton.)

The Witness: Jack C. Benton.

Trial Examiner Myers: Please spell your last name for [11] the record.

The Witness: B-e-n-t-o-n.

Trial Examiner Myers: Where do you live, Mr. Benton?

The Witness: Route 1, Box 60-H, Reno, Nevada.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Royster.

By Mr. Royster:

Q. What is your occupation?

A. Heavy-duty mechanic.

Q. By whom are you employed?

A. Nevada Truck Sales.

Q. Is that in Reno? A. Yes, sir.

Q. Were you ever employed by Wells, Inc.?

A. Yes, sir.

Q. During what periods or period?

A. August 17, 1942 to January 31, 1945.

Q. What was the last job classification that you had with Wells?

A. Shop foreman.

Q. How long were you classified as shop foreman?

A. From April 16, in '43, to January 31, in '45.

Q. What were your duties as shop foreman?

A. Duties were to keep the rigs, the trucks in

(Testimony of Jack C. Benton.)

service, repair to all necessary equipment to transports running out of Reno. [12]

Q. Did you direct the activities of other employees?

A. Yes, sir, of greasemen, tire men, helpers and mechanics.

Mr. Callister: Now, in order to save time, we will be glad to stipulate this witness, Mr. Benton, during the period he refers to, was shop foreman, had the right to hire and fire, did do so, did supervise repair work and so forth, if the Board desires to so stipulate.

Mr. Royster: I think the testimony has covered that up to this point.

Trial Examiner Myers: You want to accept the stipulation? Do you so stipulate, Mr. Royster?

Mr. Royster: I so stipulate.

Trial Examiner Myers: And you, Mr. Callister?

Mr. Callister: I so stipulate.

Trial Examiner Myers: Very well.

Q. (By Mr. Royster) Will you describe the operation of the Wells shop here in Reno, Mr. Benton?

A. You mean the mechanical work?

Q. Yes, just what is done there.

A. Well, it's complete repair work on all transports, trucks that come in from various jobs that belonged to Wells, Inc., pertaining to mechanical

(Testimony of Jack C. Benton.)

work, welding, greasing, servicing, putting them out in first class shape.

Q. Was there any limitation on the type of repairs made on trucks? [13]

A. No, we done everything.

Q. What do the greasers do in the shop?

A. Oh, one time they greased trucks, cleaned floors, washed parts, helped mechanics, and changed tires before we had a tire man.

Trial Examiner Myers: You mean from time to time they do these various jobs?

The Witness: Well, whenever they weren't putting a truck into service they washed parts, helped the mechanic get tires ready for the transports.

Q. (By Mr. Royster) Do you know Ralph Mudge? A. Yes.

Trial Examiner Myers: How do you spell that?

Mr. Royster: M-u-d-g-e.

Q. (By Mr. Royster) What was his job classification at Wells, Inc.? A. The last?

Q. Well, no, the first job classification?

A. Grease man. I hired him for night greaser.

Q. Did his classification change?

A. Yes, sir.

Q. To what did it change?

A. Well, I think he was worked up to what we call the handyman.

Mr. Callister: At this time, Mr. Examiner, I

(Testimony of Jack C. Benton.)

feel that [14] this line of examination is immaterial, incompetent and irrelevant, and I do not yet know—no doubt it is preliminary—I do not know what it is preliminary to, but I would like to reserve a motion at this time, unless it is tied up with something material, I would like to move to strike it.

Trial Examiner Myers: Very well, if he doesn't connect it up, you may move to strike.

Will you fix some time when the man was hired and when his job changed?

Mr. Royster: Nothing turns on that period, Mr. Examiner, but I shall do so. The purpose of this examination is merely to describe the operation of the shop, what the employees did to arrive at the final conclusion of what constitutes an appropriate bargaining unit.

Trial Examiner Myers: Do you dispute the appropriateness of the unit?

Mr. Callister: Mr. Examiner, we have never yet been able to find out what they claim the unit to be. Now, if the Board or Union, International Association of Machinists, would tell us what they claim the unit to be, we are in a position to say whether we will accept it or not. It is not our purpose to quibble over the unit if we can find out what it is.

Now, I think the Board or the Union should tell us what the appropriate unit here is for the purpose of collective [15] bargaining.

Trial Examiner Myers: Well, do you want to

(Testimony of Jack C. Benton.)

discuss that off the record, Mr. Royster, or on the record?

Mr. Royster: I think on the record. The unit is set forth in the Complaint and is denied by the Respondent's Answer.

Mr. Callister: Now, Mr. Examiner, it is not described in the Complaint fully for the reason that it says nothing about foremen. It is the first time I have ever seen a unit described as that set forth in the Complaint.

Trial Examiner Myers: Are you objecting to the classification, or to the persons who are supposed to constitute the unit?

Mr. Callister: Not as individuals, but the job classifications are not replete.

Now, I notice here, paragraph 4 in the Complaint, it says nothing about the exclusion of supervisors or foremen, and so forth. Although that may not sound material, it is to us because many times we have a leadman, shop superintendent, shop foreman, and some are under and some are not under the appropriate unit. This is the first time, frankly, that we have ever had the unit described as much as it has been here.

I think this, Mr. Examiner: If the Board or the Union would tell us what they claim the unit to be in terms which I think we are entitled to know, then we will be in a position [16] to tell this Board whether we agree or disagree with it. I think we are entitled to that.

(Testimony of Jack C. Benton.)

Trial Examiner Myers: Very well, we will go off the record while you draw up your proposed stipulation.

(Discussion off the record.)

Trial Examiner Myers: On the record.

At the request of counsel, we will take a short recess. You may step down.

(Short recess.)

Trial Examiner Myers: Are you ready, gentlemen?

Mr. Royster: Ready for the Board.

Trial Examiner Myers: Will you take the stand, please, Mr. Benton?

Mr. Royster: During an off-the-record conference, Mr. Examiner, counsel have arrived at a tentative stipulation with respect to the unit, which I will now state.

It is hereby stipulated among counsel for the Respondent, Representative of the Union, and counsel for the Board, that all mechanics, mechanic helpers, and mechanic apprentices employed by the Respondent at its Reno shop, excluding grease men and all supervisory employees with authority to hire, promote, discharge, discipline, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining.

Trial Examiner Myers: You mean during all the time that [17] is material herein?

(Testimony of Jack C. Benton.)

Mr. Royster: During all the time that is material herein.

Trial Examiner Myers: Constituted and now constitutes——

Mr. Royster: A unit appropriate for the purposes of collective bargaining.

Trial Examiner Myers: Is that stipulation acceptable to you, Mr. Callister?

Mr. Callister: Yes, with this reservation, Mr. Examiner: That we feel that to stipulate to a unit appropriate for the purpose of collective bargaining at this time under this Complaint changes the matter into a representation hearing rather than failure to bargain, because we take the position that you cannot bargain until such time as the unit is agreed upon. Now, we are now agreeing what the unit for purposes of collective bargaining is, and we stipulate, in other words we think that is an appropriate unit and will so stipulate. But in so stipulating, say that we do so with the statement that we have not at any time recognized the Union as the agent for this unit because we have not yet had an opportunity to. Now, since we have determined what the unit is and we feel that any further proceedings under this Complaint now in view of this stipulation would be immaterial, incompetent and irrelevant, and this actually now sets down to a representation hearing if we are served with the proper representation [18] petition.

Trial Examiner Myers: We are only taking up now the unit question.

(Testimony of Jack C. Benton.)

Mr. Callister: I appreciate that, but I wanted our position known for the record.

Trial Examiner Myers: Do you stipulate, do you accept the stipulation offered by Mr. Royster?

Mr. Callister: That is correct, with the reservation, with the statement I have made.

Trial Examiner Myers: Do you stipulate, Mr. Apperson?

Mr. Apperson: The Machinists so stipulate.

Trial Examiner Myers: And you, Mr. Royster?

Mr. Royster: I stipulate for the Board.

Trial Examiner Myers: Very well.

Q. (By Mr. Royster) Do you know Ray Reisbeck? A. Yes, sir.

Trial Examiner Myers: Will you spell the last name, please?

Mr. Royster: R-e-i-s-b-e-c-k.

Q. (By Mr. Royster) What was his position in December, 1944? A. Tireman.

Q. By whom was he employed?

A. Wells, Inc.

Mr. Callister: Just a moment, we object to this and move [19] to strike on the grounds that it is immaterial, incompetent and irrelevant. Tire men have nothing whatever to do here.

Trial Examiner Myers: Is this part of the unit, an 8(5) aspect of the case?

Mr. Royster: Part of the 8(5) aspect of the case, but I planned to introduce records later showing the employees on the payroll as of certain dates.

(Testimony of Jack C. Benton.)

Now, that record will not show that Reisbeck is a tireman.

Mr. Callister: What makes the difference whether he is or not?

Trial Examiner Myers: You want to exclude him from the unit, Mr. Royster?

Mr. Royster: He will be excluded under that stipulation.

Trial Examiner Myers: You are going to take a list of people whose names appear on the list supplied by Mr. Callister and exclude certain people that you think should be excluded?

Mr. Royster: He is the only one in that particular category because the payroll does not show he is a tireman. It shows him listed as a foreman, but a foreman would not automatically be excluded from the unit described by our stipulation, unless there was a showing actually he exercised supervisory authority.

Mr. Callister: Why don't we do this: Now, all we are concerned with is the names of those individuals, mechanics and mechanic helpers. [20]

Mr. Royster: All right, that is very well, but in the case of this Reisbeck, the payroll would not show what he is. I am showing what he is.

Trial Examiner Myers: What do you claim he is?

Mr. Callister: Tire foreman.

Trial Examiner Myers: Therefore he should be excluded from the unit?

And you, Mr. Royster?

(Testimony of Jack C. Benton.)

Mr. Royster: I agree.

Trial Examiner Myers: And you, Mr. Apperson?

Mr. Apperson: Yes.

Mr. Callister: I do not see any materiality in it.

Mr. Royster: It is material in proving the composition of the unit.

Trial Examiner Myers: Do not get into any discussion. Mr. Reisbeck is not to be included in the unit?

Mr. Royster: That is agreed.

Trial Examiner Myers: What is his first name?

Mr. Royster: Ray.

Q. (By Mr. Royster) Do you know E. S. Casinella? A. Yes.

Trial Examiner Myers: How do you spell it?

Mr. Royster: C-a-s-i-n-e-l-l-a.

Trial Examiner Myers: Regarding that man, what is your position as to him, Mr. Royster? [21]

Mr. Royster: The position of the Board is that Casinella at all times material under this complaint was a non-supervisory mechanical employee of Wells, Inc., at Reno.

Trial Examiner Myers: You say he should be included?

Mr. Royster: Should be included in the unit.

Trial Examiner Myers: Mr. Callister?

Mr. Callister: I understand he is a blacksmith.

Trial Examiner Myers: And you say he should be excluded?

Mr. Callister: That is right.

(Testimony of Jack C. Benton.)

Trial Examiner Myers: What is your position, Mr. Apperson?

Mr. Apperson: Same as the Board's.

Trial Examiner Myers: Go ahead, then, with your examination.

Q. (By Mr. Royster) Was Mr. Casinella employed by Wells, Inc., at Reno? A. Yes.

Q. Do you know what his work was, what the nature of his duties was, say in May, 1944?

A. May '44?

Trial Examiner Myers: You mean throughout the month of May, '44?

Q. (By Mr. Royster) Throughout the month of May, 1944?

A. Building bodies, welding. He also done mechanical work, rebuilding of truck frames, installing under-carriage, and [22] that.

Q. Now, during the month of October, 1944, do you know what work he was doing?

Trial Examiner Myers: Throughout the month of October?

Q. (By Mr. Royster) Throughout the month of October, 1944. A. October of '44?

Q. Yes, sir.

A. Well, in the same capacity as far as I know, yes, sir.

Q. What opportunity had you to know what he was doing during that month?

A. Well, I was back and forth to the body shop. We worked together. He would want something made or taken out and we generally had the pick-

(Testimony of Jack C. Benton.)

ups over there. He would call up and want a part or want me to come over for suggestions or something like that, and I was back and forth over there.

Q. Throughout the month of December, 1944, can you tell us what work was performed by Mr. Casinella?

A. I would say about the same, maybe a little more mechanical work.

Q. During that month where did he work in relation to the place that you worked?

A. Well, they were working over on Lake and——

Trial Examiner Myers: Who is "they"?

The Witness: Well, the shop, the body shop is at Lake, I forget the name of the other street. It was on Lake street anyway, on the corner of Lake and Plaza I think. [23]

Q. (By Mr. Royster) Will you tell us very briefly what work was done in the body shop?

A. Well, they built bodies, they built stake bodies, built ore bodies for Elko, and they also pulled motors and front ends, and differentials, and assembled quite a bit of trucks there in December, along the latter part of '44.

Q. Are you familiar with the tools necessary to the performance of work in the body shop?

A. Well, yes, pertains to mechanical tools, acetylene welding, and arc welding, and blacksmith's tools.

Q. Do you know under whose direction Mr. Casinella worked?

(Testimony of Jack C. Benton.)

A. At one time he was under mine, and I told Richer it was too much for me to be at the body shop and the garage, and our repair service where Wells is located at present, and the service shop, and that I didn't want to have anything to do with it.

Q. You mentioned Mr. Richer. Who is he?

A. Superintendent of maintenance before Mr. Divine came in. And then when Richer told me, he said, "You won't have anything to do with the shop over there."

Trial Examiner Myers: When did he tell you this?

The Witness: It was approximately two months after Casinella went to work there.

Trial Examiner Myers: Well, when would you say that was? [24]

The Witness: Well, I really don't know the date.

Trial Examiner Myers: What year was it?

The Witness: That was in '43 I think.

Q. (By Mr. Royster) Do you know whether or not Mr. Casinella worked with tools?

A. Yes, sir, he worked with tools.

Q. Do you have means of knowing or can you testify as to the approximate amount of his time he spent working with tools?

A. Well, about, I guess 75 per cent.

Q. How was the the other 25 per cent of his time divided?

A. Well, supervising and welding.

Q. Did he have men under his supervision?

(Testimony of Jack C. Benton.)

A. Yes, sir.

Q. Do you know about how many?

A. Two to three.

Q. Now, is that true in the month of May, 1944, throughout the entire month? A. Yes.

Q. The month of October, 1944?

A. Yes.

Q. And the month of December, 1944?

A. Yes.

Q. Do you know the extent of Mr. Casinella's authority over these two or three men?

A. No, I really couldn't swear to that. He hired some men [25] and some men were taken from my shop and put in there.

Q. By whom were they taken from your shop?

A. Well, they were put over to work on some trucks that we had in the body shop.

Trial Examiner Myers: Do you dispute the supervisory status of Casinella?

Mr. Callister: No, we will stipulate that Mr. Casinella was a foreman with the right to hire and fire, and did fire as Mr. Benton so testified.

Mr. Royster: Mr. Myers, I am really not sure about the status of Casinella. I am just trying to develop for the record what actually he did, and I do not know whether the Board will find him to be supervisory or not.

Q. (By Mr. Royster) Now I believe you just testified that certain employees from the shop under your direction were transferred over on occasion to work in the body shop under Mr. Casinella.

(Testimony of Jack C. Benton.)

A. I put them over. They worked under my supervision on trucks we are dismantling and then assembling, and then Richer, Mr. Richer, the superintendent, advised me and we talked it over that we would leave those boys in the shop and one was left there permanently, and taken under Mr. Casinella's supervision, I suppose you would call it, which is Mr. Palmer.

Q. When you say leave them in the shop, you mean leave this [26] particular individual in the body shop?

A. In the body shop, yes, sir.

Q. What was the classification of the employees who were transferred from the shop where you worked to the body shop? A. Mechanics.

Q. Mechanics? A. Yes, sir.

Q. Do you know C. H. Haverland?

A. Yes, sir.

Q. Do you know what work he was doing—strike that. Was he ever employed by Wells, Inc.?

A. Yes, sir.

Trial Examiner Myers: Before we go any further on that, what is your position regarding that gentleman?

Mr. Royster: That he should be in the unit, that he is a mechanic working in the shop at Reno and is within the appropriate bargaining unit.

Mr. Callister: I don't know, may I make this statement: I think if Mr. Royster will tell us whom he thinks should be in the unit we will agree. I do

(Testimony of Jack C. Benton.)

not think it is necessary to go through this examination.

Trial Examiner Myers: Off the record.

(Discussion off the record.)

Trial Examiner Myers: On the record. [27]

Mr. Callister: We will stipulate, Mr. Examiner, that the following individuals who appear on the payroll of Wells, Inc., Respondent herein, on the 15th day of December, 1944, were in the following job classifications:

A. B. Gandrud was what may be termed a lead-man, or he had some supervisory powers but did not have the right to hire or fire or recommend hiring or firing.

Trial Examiner Myers: What is your position as to whether he should be——

Mr. Callister: (Interposing) We will stipulate he is in the unit and we will do the same with Hollenback, Haverland, Ellis, Mudge, Staats, Tower, McFadden.

In respect to——

Trial Examiner Myers: Just a minute, we will take that stipulation up first.

You stipulate they should be included in the unit?

Mr. Callister: That is right, they are mechanics, mechanic helpers.

Trial Examiner Myers: During all the time material herein they were?

Mr. Callister: Either mechanics or mechanic helpers.

(Testimony of Jack C. Benton.)

Trial Examiner Myers: And they should be included in the unit?

Mr. Callister: That is right.

Trial Examiner Myers: Do you so stipulate, Mr. Royster? [28]

Mr. Royster: It is satisfactory to the Board, Mr. Examiner, I would so stipulate.

Trial Examiner Myers: Mr. Apperson?

Mr. Apperson: The Machinists so stipulate.

Trial Examiner Myers: Very well.

Now, can you agree on the names that Mr. Callister is going to read out now?

Mr. Callister: Now, in respect to Wilson and McBride, our records show and our information is that they are blacksmith helpers, they build bodies, and that type of work, do not do mechanical work where that word is defined to mean fixing differentials or crank cases, they do not use tools to fix the mechanical end of a truck. They are body builders. The records will so show.

Trial Examiner Myers: They should be excluded?

Mr. Callister: We have no objection to including them, but we are stating the facts. We have determined what the unit is, and now we are telling you the factual situation of these men. If the Board wants to put them in, fine. If not, it makes no difference what.

As I understand the only other individual there is a question on is Casinella, the one testified to, that has a right to hire and fire.

(Testimony of Jack C. Benton.)

Trial Examiner Myers: The record shows what his job is. [29]

Mr. Callister: We, so the record will be clear, take the position that he should not be included because he is a foreman.

Q. (By Mr. Royster) Mr. Benton, do you know a C. H. McBride? A. Yes, sir.

Q. Do you know whether or not he was employed by Wells, Inc.? A. He was.

Q. Do you know what work he did?

Trial Examiner Myers: When, Mr. Royster?

Q. (By Mr. Royster) Do you know what work he did during the month of October, 1944?

Trial Examiner Myers: Throughout the month?

A. Yes, sir, I would say McBride is the only one working for Casinella entitled to be classed as a body builder, that he carried a blacksmith's card and also ornamental iron workers' card. I don't think he had very many tools. He was the only one working for Casinella that could be classed as full blacksmith helper.

Q. (By Mr. Royster) Just what work did he do?

A. He assisted in laying out, mostly putting in the floors and helping Wilson and Casinella assemble, install, assemble parts.

Trial Examiner Myers: Assembly parts of what?

The Witness: Assemble parts such as differentials, front axle, motors, ground lines, transmissions pertaining [30] to a truck.

(Testimony of Jack C. Benton.)

Q. (By Mr. Royster) Do you know whether his work changed in any respect throughout the entire month of December, 1944?

A. No, I don't think so.

Q. Is it your testimony that it was the same or was not the same? A. The same.

Q. It was the same? A. Yes.

Q. Do you know R. H. Wilson?

A. Yes, sir.

Q. Do you know what work he did for Wells, Inc.?

A. He came to work for Wells, Inc., in—he hired out in my shop as going to learn the mechanical trade so that he could be transferred later to some different project of Wells, Inc., so that he could take over a shop or else be a supervisor.

Q. Do you recall about when it was that he was hired? A. No, I don't.

Trial Examiner Myers: Do you know what year?

The Witness: '44 I think.

Trial Examiner Myers: Do you know what part of 1944?

The Witness: Well, I think it was in the summer of '44, yes, sir. [31]

Q. (By Mr. Royster) Your recollection on that is approximate, is it? A. Yes.

Q. Do you know what work R. H. Wilson or H. Wilson—

Trial Examiner Myers: Is it one and the same person?

(Testimony of Jack C. Benton.)

Mr. Callister: Yes, we will so stipulate that R. H. Wilson is the same as H.

Trial Examiner Myers: What is his first name?

The Witness: His first name is Robert, but they call him Harold, by his middle name.

Q. (By Mr. Royster) Do you know what work Robert Wilson or Harold Wilson did during, throughout the entire month of October, 1944?

A. I would say that he performed about 75 or 80 per cent of mechanical work, and the rest body work.

Q. Where did he perform this work?

A. Oh, their body shop on Lake Street.

Trial Examiner Myers: Did he always work at the body shop on Lake Street?

The Witness: No, sir, he was transferred over to the body shop to learn welding so he had Casinella, he could teach him welding and also he wanted to learn the welding and acetylene and arc and then the mechanical game too, together.

Trial Examiner Myers: When was he transferred? [32]

The Witness: Not long after he went to work for me in the shop at Wells cargo service shop.

Trial Examiner Myers: Would you say he worked for you about a month?

The Witness: About a month, yes, sir.

Trial Examiner Myers: What did he do for you during that time.

The Witness: Well, he was classed——

Trial Examiner Myers: What did he do?

(Testimony of Jack C. Benton.)

The Witness: He was a helper.

Trial Examiner Myers: Helper on what?

The Witness: Mechanic on trucks drawing journeyman's wages.

Trial Examiner Myers: What kind of helper work did he do, did he work on the motor?

The Witness: Helped install motors, transmissions, take up brakes or remove broken parts from the trucks.

Trial Examiner Myers: Go ahead.

Mr. Royster: That is all.

Trial Examiner Myers: Any questions, Mr. Callister?

Mr. Callister: Yes, I have.

Trial Examiner Myers: Will you kindly proceed?

Cross Examination

Q. (By Mr. Callister) Mr. Benton, as I understand it, during the months of October and through the month of [33] December, prior to your leaving the employ of Wells, you were their shop foreman in charge of all the mechanical work?

A. Yes, sir.

Q. As I understood, we stipulated you did hire and fire?

A. Yes, every man that was in the shop.

Q. You hired and fired?

A. Nobody hired him unless it was on approval.

Q. But you did it? A. Yes, sir.

Q. If they were going to be hired by anyone else, they had to be approved by you?

(Testimony of Jack C. Benton.)

A. Well, Bob there.

Trial Examiner Myers: Bob who?

The Witness: Bob Wells, Howard Wells, we generally if a man came in we talked it over.

Q. (By Mr. Callister) But the fact it was up to you primarily who you should have?

A. The responsibility was left to me.

Q. And the hiring and firing, of course?

A. Yes, sir.

Q. Your answer is "Yes"? A. Yes, sir.

Q. In respect to McBride, he was over on the Lake Street shop, which is a body-building division, is that correct? [34] A. Yes, sir.

Q. All he did was build bodies with Mr. Casinella?

A. Oh, no, he assisted in the helping work, assembling parts that were overhauled, as I stated.

Trial Examiner Myers: Parts of what?

The Witness: Parts overhauled.

Trial Examiner Myers: Of a motor?

The Witness: Trucks in general, front axles, transmissions, differentials.

Q. (By Mr. Callister) He did not use tools, as I understand it? A. Yes, he used tools.

Q. He did not have tools like the regular mechanics? A. Not a complete set.

Q. In other words, he did that work ordinarily referred to as blacksmith's helper or body building?

A. I guess body builder.

Q. That is right, he is a body builder?

(Testimony of Jack C. Benton.)

A. Well, he is a 50-50 man because they done all kinds of work there.

Q. Now, during the month of December you were moving the shop, were you not?

A. Yes, they were trying to get——

Q. (Interposing) No one at that time was doing much mechanical work, if any. [35]

A. Yes, sir, we had one truck in there completely dismantled.

Q. Only a few are working on that?

A. Casinella, McBride and Wilson were trying to get the truck.

Q. During the month of December?

Trial Examiner Myers: 1944?

Q. (By Mr. Callister) Yes, the shop was being moved, and as a result very few of the trucks, if any, were being repaired?

A. No, the shop was just as full with trucks as it ever was.

Q. Maybe it was full of trucks, but were they repairing?

A. Repairing and moving just the same.

Q. Not in the body shop, were they?

A. Yes, they had a party moving.

Mr. Callister: That is all.

Trial Examiner Myers: Any questions?

Mr. Apperson: No questions.

Trial Examiner Myers: Any redirect?

Mr. Royster: No redirect.

(Testimony of Jack C. Benton.)

Trial Examiner Myers: You are excused, Mr. Benton.

(Witness excused.)

Trial Examiner Myers: Will you call your next witness, Mr. Royster? [36]

Mr. Royster: Mr. McKay.

GEORGE E. McKAY,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: George E. McKay.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: Mc-K-a-y.

Trial Examiner Myers: And what is your address?

The Witness: 1115 Sierra Street.

Trial Examiner Myers: Reno?

The Witness: Reno, Nevada.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Royster.

Q. (By Mr. Royster) What is your occupation, Mr. McKay? A. I am a garage owner.

Q. Where do you operate your garage?

A. 423 North Virginia, Reno.

(Testimony of George E. McKay.)

Q. Reno? A. Reno, Nevada.

Q. Are you a member of the International Association of Machinists? [37] A. I am.

Q. Do you hold office in that Union?

A. I do.

Q. What office do you hold?

A. I am Financial Secretary and Business Representative for the Machinists Local in Reno, Nevada.

Q. What are the duties of that office?

A. The duties are to collect all members you possibly can, initiate them in and collect dues, see that the men do not fall back and drop out, and if any of the members have any misunderstanding, why we straighten that out. It's to see that the Local is kept going and in order.

Trial Examiner Myers: What is the number of the Local?

The Witness: 801.

Q. (By Mr. Royster) Well, in connection with the performance of the duties of your office in the Union, do you solicit workers to join the Union?

A. I do.

Q. Have you solicited employees of Wells, Inc.?

A. I have.

Q. Have any of them given you authorization to represent them in matters of collective bargaining? A. They have.

Q. Have you brought any of those designations with you? A. I have. [38]

Q. May I see them, please?

(Testimony of George E. McKay.)

A. Yes.

Mr. Royster: Will the Trial Examiner indulge me for a moment while I line these up.

Trial Examiner Myers: Very well, sir.

Off the record.

(Discussion off the record.)

Trial Examiner Myers: On the record.

Mr. Royster: Will the Reporter please mark these for identification Board's No. 2(a), (b), (c), and so forth?

(Thereupon the documents above referred to were marked Board's Exhibits Nos. 2(a) through 2(k), inclusive, for identification.)

Q. (By Mr. Royster) Mr. McKay, I show you Board's Exhibit 2(a) for identification, and ask if you can tell us what it is?

Mr. Callister: We object on the ground that the exhibit speaks for itself.

Mr. Royster: This is preliminary. I want him to identify it.

Trial Examiner Myers: Just don't tell us these are slips of paper or something like that. Describe it in detail.

The Witness: This is an authorization.

Trial Examiner Myers: The objection was overruled. [39]

The Witness: An authorization signed and witnessed and the employer is Wells, Inc.

Q. (By Mr. Royster) Whose signature does it purport to bear?

(Testimony of George E. McKay.)

A. The signature is E. F. Staats.

Q. Is that signature witnessed?

A. That signature is witnessed.

Q. By whom?

A. By Melvin Jakomiet.

Q. How did it come into your possession?

A. I failed to get all the men at Wells, Inc. when I was getting the authorizations signed and that at our regular meeting of the International Association of Machinist in Reno, Nevada, Melvin Jackomiet is a member in good standing, and I asked him to take a few slips and sign the men that I had not got yet and sign them, have them sign if they would and him witness by his name and turn them over to me which he has done.

Q. Can you tell us approximately when that authorization slip was given to your possession?

A. That was given to me the day after it was signed.

Q. What day then did you receive it?

A. I received it on the 10th, 5th and '44.

Trial Examiner Myers: The 5th day of October, 1944?

The Witness: That is right. [40]

Q. (By Mr. Royster) Now, as Business Agent and Financial Secretary of Local 801, International Association of Machinists, do you know whether or not E. F. Staats, whose purported signature is on that exhibit, is a member of the Local?

Mr. Callister: Just a moment, we object to it on the ground that it is not the best evidence.

(Testimony of George E. McKay.)

Trial Examiner Myer: I will sustain the objection.

Q. (By Mr. Royster) Since October 5, 1944, have you in the performance of your office as Business Representative of the Local 801 collected dues from E. F. Staats?

Mr. Callister: We object that that is not the best evidence. Let the record show that.

Trial Examiner Myers: Overruled. Just answer "Yes" or "No".

A. Yes.

Q. (By Mr. Royster) I show you Board's Exhibit 2(b) for identification, and ask if you can identify it? A. I do.

Q. Will you tell us what it is?

A. It is an authorization signed by Ralph Mudge, witnessed by Melvin Jakomiet.

Mr. Callister: Just a moment. I move to strike the statement that it is signed by Ralph Mudge, unless it is shown that he actually was present or knows his signature. [41] I think we ought to have it proper here.

Trial Examiner Myers: I think Mr. Callister is right. Strike out the answer.

Q. (By Mr. Royster) Whose signature does it purport to bear?

Mr. Callister: The instrument itself sets forth Ralph Mudge and it speaks for itself.

Trial Examiner Myers: Whose name is on there?

The Witness: Ralph Mudge.

(Testimony of George E. McKay.)

Q. (By Mr. Royster) How did it come to your possession?

A. This one was signed the same as the first one, witnessed by Melvin Jakomiet, which I had asked him to get signed and return to me.

Q. When did that document come to your possession?

A. This come to me October 5, 1944.

Q. From whom did you get it?

A. From Melvin Jakomiet.

Q. Where is Melvin Jakomiet?

A. Melvin Jakomiet is in the Army now.

Q. As Financial Secretary and Business Agent of Local 801 have you collected dues from Ralph Mudge since October 5, 1944?

A. I have.

Q. I show you Board's Exhibit 2(c) for identification, and ask if you can identify it?

A. I do. [42]

Q. What is it?

A. It is an authorization signed by——

Mr. Callister: (Interposing) Just a minute, let me see it first.

(The document was handed to Mr. Callister.)

A. Authorization signed by Freemond L. Reed of the Wells, Inc., witnessed by George E. McKay, that is myself.

Q. (By Mr. Royster) When was it signed?

A. September 30, 1944.

Mr. Callister: Just a moment, I move to strike on the ground that our stipulation shows that he

(Testimony of George E. McKay.)

was not an employee at that time nor a man to come within this unit.

Mr. Royster: Which one is this?

Mr. Callister: Reed.

Trial Examiner Myers: Off the record.

(Discussion off the record.)

Trial Examiner Myers: On the record.

Do you withdraw your motion, Mr. Callister?

Mr. Callister: Yes, I do.

Q. (By Mr. Royster) Now, Mr. McKay, I show you Board's Exhibits 2(d) through 2(k).

Mr. Callister: Mr. Royster, so the record will be clear, let the record show this Mr. Reed was on the payroll of September 30, 1944, but was not on the payroll as of the 15th day of December, 1944. [43]

Mr. Royster: That is correct.

Q. (By Mr. Royster) And I ask you if you can identify them.

Trial Examiner Myers: Taking one at a time, Mr. McKay, read off the exhibit number.

A. This is an authorization signed by R. O. Garoutte, and witnessed by George E. McKay on August 10th, 1944.

Trial Examiner Myers: Signed August 10, 1944?

The Witness: That is right.

Trial Examiner Myers: What exhibit number is that, Mr. Royster?

Mr. Royster: Exhibit No. 2(d), Mr. Examiner.

The Witness: This is an authorization signed by George W. Palmer, employee of Wells, Inc. on 6/3/44, witnessed by George E. McKay.

(Testimony of George E. McKay.)

Trial Examiner Myers: June 30, 1944?

The Witness: No, June 3rd.

Mr. Callister: Just a moment. I think we ought to with each one of these authorization, state whether he was on the payroll so the payroll will show.

Trial Examiner Myers: Why don't you offer the payroll in evidence now and then we will have it. Is that agreeable to you, Mr. Callister?

Mr. Callister: Yes.

Mr. Royster: I offer at this time, Mr. Examiner, as Board's Exhibit 3, the payroll for the shop employees of the [44] Respondent at Reno, Nevada, for the period ending May 15, 1944, and the period ending September 30, 1944, and with the notation which appears on this document that there were no changes in the personnel of the shop on May 16, 1944, and no changes in the personnel of the shop during the period from October 1 to October 5, 1944.

(Thereupon the document above referred to was marked Board's Exhibit No. 3 for identification.)

Trial Examiner Myers: Is there any objection to the paper going into evidence?

Mr. Callister: Except this: I want to ask Mr. Royster one question.

What is your materiality and what you contend for the payroll as of May 15, 1944?

Mr. Royster: The complaint alleges a refusal to bargain on the 15th of May, 1944; also on the 5th of October, and 22nd of December.

(Testimony of George E. McKay.)

Trial Examiner Myers: And this Exhibit No. 3 for identification shows the payroll of May 16, 1944, is that right?

Mr. Royster: That is correct, sir.

Trial Examiner Myers: Any objection to the paper going in evidence?

Mr. Callister: No.

Trial Examiner Myers: There being no objection, the paper is received in evidence, and I will ask the Reporter to [45] please mark it Board's Exhibit No. 3.

(The document heretofore marked Board's Exhibit No. 3 for identification was received in evidence.)

Mr. Royster: Will the Reporter please mark this as Board's Exhibit No. 4 for identification?

(Thereupon the document above referred to was marked Board's Exhibit No. 4 for identification.)

Mr. Royster: Mr. Examiner, I offer Board's Exhibit 4, a payroll list of the employees of the Respondent as of December 15, 1944. Now, on this document appears also a payroll list for Luning and for Elko, which play no part in this proceeding. The names listed on this payroll to whom this proceeding pertains have been entered into the record by stipulation as to the composition of the unit.

Trial Examiner Myers: The persons whose names appear on that list were in the Respondent's

(Testimony of George E. McKay.)

employ, that is, Reno division of the Respondent on December 22, 1944?

Mr. Royster: On December 15, 1944, Mr. Examiner.

Mr. Callister has told me that he will be able to tell us this afternoon which, if any, of these employees were terminated between the 15th of December and the 22nd, and what employees who might fall within the appropriate bargaining unit were hired between those two dates.

Mr. Callister: As I understand it, what you want is the employees if any changes were made since the 15th day of [46] December, 1944, to the 22nd day of December.

Mr. Royster: That is right, either by hiring or firing.

Mr. Callister: We will have it for you.

Trial Examiner Myers: Is there any objection to this paper going in evidence?

Mr. Callister: We have no objection.

Trial Examiner Myers: There being no objection, the paper is received in evidence, and I will ask the Reporter to please mark it as Board's Exhibit No. 4.

(The document heretofore marked Board's Exhibit No. 4 for identification was received in evidence.)

Trial Examiner Myers: Were these Exhibits 3 and 4 prepared by the Respondent?

Mr. Callister: Yes.

(Testimony of George E. McKay.)

Trial Examiner Myers: Very well.

Q. (By Mr. Royster) Now, Mr. McKay, I forgot the exact status of your testimony. You were testifying concerning Board's Exhibit 2(e), I believe.

Trial Examiner Myers: Is that the one signed June 3, 1944?

The Witness: That is right.

Trial Examiner Myers: What is the next one, 2(f)?

Mr. Royster: 2(f).

The Witness: I have another one here, authorization signed by R. H. Wilson, an employee of Wells, Inc. on June [47] 3, 1944, and witnessed by George E. McKay.

Trial Examiner Myers: That is, it was signed on that date?

The Witness: That is right.

Trial Examiner Myers: Handed to you on that date?

The Witness: I was there when it was signed.

Trial Examiner Myers: That is true as to the other exhibits you just testified to?

The Witness: That is right, yes.

Trial Examiner Myers: They were signed in your presence?

The Witness: That is right.

Trial Examiner Myers: On the dates they bear?

The Witness: That is right.

Q. (By Mr. Royster) Is that true as to all the

(Testimony of George E. McKay.)

exhibits marked for identification which bear your signature as a witness?

A. That is right.

Q. Now, as to Board's Exhibit 2(g)?

A. That is an authorization signed by E. S. Casinella on June 3, 1944, witnessed on the same day by George E. McKay.

Q. You saw him sign that authorization?

A. I did.

Q. As to Board's Exhibit 2(h)?

A. This is an authorization signed by Rudy Zayas.

Q. How do you spell that? [48]

A. Zayas, an employee of Wells, Inc., signed on June 3, 1944, and witnessed by George E. McKay.

Q. You saw him append his signature to that document on June 3, 1944? A. I did.

Q. Board's Exhibit 2(i)?

A. An authorization signed by Melvin Jakomiet, signed on June 3, 1944, and witnessed by George E. McKay.

Q. You saw Mr. Jakomiet put his signature on this document on June 3, 1944? A. I did.

Q. Board's Exhibit 2(j)?

A. It is an authorization signed by Oran Ellis, signed on June 3, 1944, and witnessed by George E. McKay.

Q. Again, you saw Mr. Ellis sign this document?

A. I did.

Q. Board's Exhibit 2(k)?

A. This is an authorization signed by Charles

(Testimony of George E. McKay.)

Haverland, employee of Wells, Inc. on June 3, 1944, and witnessed by George E. McKay.

Q. You saw Mr. Haverland put his signature on that document? A. I did.

Mr. Royster: Mr. Examiner, I offer Board's Exhibit 2(a) through 2(k) for identification in evidence.

Trial Examiner Myers: Any objection? [49]

Mr. Callister: Yes, there is, Mr. Examiner. We object first on the ground it is immaterial, incompetent and irrelevant and no materiality is shown or tied up as to the date upon which they are to become effective. For illustration, we find we have authorizations here from June through October of 1944. I notice one here on June 3.

Now, it is our position until such time as the Board states when these were to become effective when they had the majority of the employees for purposes of collective bargaining, they have no force and effect, and for the purposes of this hearing are immaterial, incompetent and irrelevant.

Now, if the Examiner please, in the pleadings here the Board states this, in Paragraph 5:

"On May 16, 1944, the Union was, and at all times since that date has been the duly designated representative——"

Now, I think that the Board is bound to show that on May 16, 1944, that they were as represented and claimed in Paragraph 5. Now, what is taking place subsequent has no force or effect and is immaterial here.

(Testimony of George E. McKay.)

Now, I do not think that the Board can bring in evidence here showing over a period for illustration of three years that people have signed authorizations subsequent to the time they claimed they represented the majority of the employees.

Trial Examiner Myers: I will overrule the objection, [50] and receive the papers in evidence, and ask the Reporter please mark them as Board's Exhibits 2(a) through and including 2(k).

(The documents heretofore marked Board's Exhibits Nos. 2(a) through 2(k), inclusive, for identification were received in evidence.)

Q. (By Mr. Royster) Mr. McKay, do you know C. H. McBride? A. I do.

Q. Can you tell us whether or not the Union claims jurisdiction over the work performed by Mr. McBride? A. We do.

Q. Do you know R. H. Wilson?

A. I do.

Q. Can you tell us whether or not the Union claims jurisdiction over the work performed by R. H. Wilson? A. We do.

Q. Did you meet Howard Wells and Bob Wells in September 1944?

Mr. Callister: Pardon me, may I at this time ask a question so we have the record clear with this past situation?

Mr. Royster; is it the position of the Board that on three distinct separate times that the Union represented the majority of the employees in the unit?

Mr. Royster: That is correct.

(Testimony of George E. McKay.)

Mr. Callister: You claim May 16, 1944, they represented a majority? [51]

Mr. Royster: Yes.

Mr. Callister: That on October 5 the Union represented a majority?

Mr. Royster: That is correct.

Mr. Callister: And on December 22nd?

Mr. Royster: Yes, sir.

Mr. Callister: Just so we have it clear, Mr. Examiner.

Mr. Royster: Actually, of course, the position of the Board is that the Union represented a majority at all times pertinent hereto since May 16, 1944, which would necessarily include the dates you mentioned.

Mr. Callister: That is what I want to get.

That being the situation, Mr. Examiner, if they represented them on May 16th then these particular designations have no force and effect as to the Board's contention. That is my point. In other words, the Board cannot come here in this hearing and say that the Union represented them in May 16, 1944, and in order to substantiate that position bring an authorization many days or months later.

Trial Examiner Myers: I see your point.

Mr. Royster: Will you give Mr. McKay my last question.

(Question read by Reporter.)

A. I did.

Mr. Callister: When was this please?

(Testimony of George E. McKay.)

The Witness: September, 1944. [52]

Trial Examiner Myers: Could we have for the record who Howard Wells is, what office he holds?

Mr. Callister: Mr. Howard Wells is Vice-President of Wells, Inc., Respondent herein, with offices at Reno.

Trial Examiner Myers: Who is the other gentleman you mentioned?

Mr. Callister: Bob Wells, Mr. Robert Wells is the Manager of Wells, Inc., Respondent at Reno.

Mr. Royster: At this point, could we have a statement as to the position of J. W. Wells?

Mr. Callister: Yes, he is President of the Wells, Inc.

Q. (By Mr. Royster) Where did this September meeting take place, Mr. McKay?

A. It took place at Wells, Inc. office on Evans Avenue.

Q. In what city? A. Reno, Nevada.

Q. Who was present at the meeting?

A. There was Bob Wells and Howard Wells and T. E. McShane and myself.

Q. Who is T. E. McShane?

A. He is the Grand Lodge Representative, International Association of Machinists.

Trial Examiner Myers: Could you fix the time of that meeting, what day, do you know the exact day?

The Witness: I can't recall the exact day, there was no [53] records kept at that time, but it was the last part of September.

(Testimony of George E. McKay.)

Q. (By Mr. Royster) Do you know who arranged this meeting?

A. Mr. McShane.

Q. What, if anything, was discussed at the meeting?

A. Well, there was——

Mr. Callister: Just a moment, I think I would like to have you just state what he said and what someone else said and no conclusions or opinions.

Mr. Royster: That is agreeable.

Q. (By Mr. Royster) What was said during the hearing?

Mr. Callister: Who said it?

A. We went in there to negotiate an agreement.

Mr. Callister: Please tell us just the conversation.

Trial Examiner Myers: That is right, you are in this conference now. Try to give us everything that you remember that was said and tell us who said it.

The Witness: Well,——

Trial Examiner Myers: We know that you can't give it verbatim, but just give us everything that you can now remember.

The Witness. Mr. McShane turned the agreement over to Howard Wells.

Trial Examiner Myers: You came there with a proposed agreement? [54]

The Witness: That is right.

Trial Examiner Myers: And Mr. McShane handed it to Howard Wells?

(Testimony of George E. McKay.)

The Witness: That is right.

Trial Examiner Myers: Did he say anything when he handed it to him?

The Witness: So Howard said "Yes."

Trial Examiner Myers: Did Mr. McShane say anything when he handed it to Mr. Howard Wells?

The Witness: He said "Look this over."

Trial Examiner Myers: Go ahead now.

The Witness: Which Howard did, started looking over, he just went through it roughly until he hit the wages. He said, "Why, God, we can't pay them wages." He said, "We ain't amaking nothing the way it is." And he said, "Before we could pay them wages we will close the place down." And he said, "Another thing, Joe Wells has to sign the agreements if any agreements are signed." So that was practically all that was said at that time.

Q. (By Mr. Royster) Was there any discussion about a bargaining unit? A. None at all.

Q. Was anything said about the Union's majority? A. Nothing.

Q. Do I understand your testimony to be that Mr. Howard Wells [55] said that any negotiations would have to be with J. W. Wells?

A. With Joe Wells. He said that Joe was in Las Vegas at that time.

Q. Was there any arrangement for a further meeting?

A. Mr. McShane tried to get ahold of Joe Wells.

Trial Examiner Myers: We mean at this meeting.

(Testimony of George E. McKay.)

The Witness: No.

Q. (By Mr. Royster) Did you have a conversation with Robert Wells about December 1, 1944?

A. I did.

Q. Where?

A. At Wells, Inc. shop on Evans Avenue.

Q. In Reno? A. Reno, Nevada.

Q. What time of day did this conversation take place?

A. This was just about the noon hour.

Q. Who was present other than you and Mr. Wells?

A. Well, the other boys around the shop and Jack Benton was just right inside the door around the corner.

Trial Examiner Myers: When did you say this took place?

The Witness: First of December.

Trial Examiner Myers: 1944?

The Witness: 1944.

Trial Examiner Myers: December 1, 1944?

The Witness: December 1, 1944. [56]

Q. (By Mr. Royster) What was said to you by Mr. Wells or by you to Mr. Wells?

A. Bob Wells told me he didn't want me to the shop. He said, "I don't want you in the shop bothering the men." I said, "I am not bothering the men. I came in to collect dues and see Jack Benton." He said, "I want you to get out of here and stay out."

(Testimony of George E. McKay.)

Q. Had it been your practice to collect dues at the shop? A. It had.

Mr. Callister: Please do not lead him, Mr. Royster.

Sorry, go ahead.

Q. (By Mr. Royster) Have you visited Wells shop since? A. I haven't.

Trial Examiner Myers: You have not?

The Witness: Have not.

Q. (By Mr. Royster) What were the men doing when you came in the shop?

A. They were getting ready to go to lunch.

Mr. Royster: I believe that is all.

Trial Examiner Myers: Mr. Callister?

Mr. Callister: Yes, I have, if I may, Mr. Examiner.

Cross-Examination

Q. (By Mr. Callister) Mr. McKay, I call your attention to this September meeting of 1944 at the office of Wells, Inc. in which you stated Mr. Howard Wells met you. Did he [57] not in effect tell you that Joe, his brother, who was the President, took charge of all negotiation with regard to labor contracts, and he couldn't do anything about it, is that right? A. That's right.

Q. That as far as he was concerned, he could not do anything. In other words, he had no authority whatsoever to do anything, isn't that about it?

A. That is right.

Q. And told you to see Mr. Joe Wells?

(Testimony of George E. McKay.)

A. That is it.

Q. And that if he could not do anything about the situation and that if anything could be done it would have to be done with Joe?

A. That is right.

Q. Now, Mr. McKay, coming back to this conversation you had with Bob Wells in the fore part of December, 1944, you said you came to see Mr. Jack Benton.

A. I came to collect dues and see Jack Benton.

Q. Is Mr. Benton the same individual who has testified here this morning?

A. That is right, he is.

Q. Who was the representative of Wells, Inc. in the shop?

A. He was supposed to be boss in the shop.

Q. That is right. You did not come to collect dues of [58] Mr. Benton because he was foreman?

A. I collected dues from Mr. Benton.

Q. You mean Mr. Benton is a member of your labor organization.

A. He is and has been.

Q. He is not an officer of the Lodge, is he?

A. He is.

Q. What was Mr. Benton at that time, what position did he hold?

A. He was a trustee and also a shop steward at Wells, Inc.

Trial Examiner Myers: That was on December 1, 1944?

The Witness: Yes, sir.

(Testimony of George E. McKay.)

Q. (By Mr. Callister) Trustee of the Local Lodge of 801? A. That is right.

Q. Mr. McKay, Bob himself told you he did not want you to bother the men while they were on the job, did he not?

A. He told me he didn't want me in the shop.

Q. Didn't he tell you himself in fact they did not permit any Business Agents to come into the shop and disturb the men, didn't he say that?

A. No, sir.

Q. But he told you he did not want you to come in there collecting dues in the shop?

A. He didn't say collecting dues, he said "I don't want you in the shop. Get out and stay out." He had seen me in there [59] many times before, but he never said that.

Mr. Callister: That is all.

Trial Examiner Myers: Any questions, Mr. Apperson?

Mr. Apperson: No questions.

Trial Examiner Myers: Mr. Royster?

Mr. Royster: No further questions.

Trial Examined Myers: You are excused, sir, thank you.

(Witness excused.)

Trial Examiner Myers: Will you call your next witness, please, Mr. Royster?

Mr. Royster: Mr. Anderson.

GLEN O. ANDERSON

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Glen O. Anderson.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: A-n-d-e-r-s-o-n.

Trial Examiner Myers: Where do you live, Mr. Anderson?

The Witness: Las Vegas, Nevada.

Trial Examiner Myers: You may be seated.

You may proceed, Mr. Royster. [60]

Q. (By Mr. Royster) What is your occupation, Mr. Anderson?

A. Business Representative for the International Association of Machinists and Business Representative for the International Brotherhood of Blacksmiths, Drop Forgers and Helpers.

Q. How long have you held your office?

A. Business Agent of the Machinists since October of '41.

Trial Examiner Myers: Are both those organizations affiliated with the American Federation of Labor?

The Witness: Yes.

Trial Examiner Myers: Were they affiliated with the American Federation of Labor during the entire year of 1944?

(Testimony of Glen O. Anderson.)

The Witness: I will have to ask.

Trial Examiner Myers: Since May 1, 1944?

The Witness: Yes.

Trial Examiner Myers: And they are still affiliated?

The Witness: Yes.

Q. (By Mr. Royster) How long have you been a representative of the Blacksmiths?

A. Since April in 1943.

Q. Who is in charge of the membership records of the Union Local at Las Vegas? That is, by that I mean the Machinists Local?

A. The records are all kept in my office in Las Vegas and I am charged with the responsibility of safekeeping and use of these records. [61]

Q. Did you bring those records with you?

A. Some of them, yes.

Q. Do you know G. W. Hollenback?

Trial Examiner Myers: How do you spell that name, please?

Mr. Royster: H-o-l-l-e-n-b-a-c-k.

A. Hollenback, yes.

By Mr. Royster:

Q. Is he a member of the International Association of Machinists? A. Yes.

Q. By reference to your records can you tell when he joined the International Association of Machinists? A. Yes.

Q. When did he join?

A. I initiated Gregory W. Hollenback, G. W. Hollenback on August 28, 1944.

(Testimony of Glen O. Anderson.)

Mr. Callister: Where?

The Witness: Las Vegas, Nevada.

Mr. Callister: Who was he working for at that time?

The Witness: Wells, Inc.

Mr. Callister: At Vegas?

The Witness: At Las Vegas, or the Henderson shop.

Mr. Callister: I move to strike the testimony with regard to Mr. Hollenback. At that time that was Wells Cargo he was working for at Vegas. [62]

The Witness: At that time it was hard to tell which company was which. Now, I wouldn't gamble any money.

Mr. Callister: You did not know who he worked for at Vegas then, as I understand it?

The Witness: He worked for, as I understand it, he worked for Wells prior to his time coming to Las Vegas and Wells, Joe Wells himself or Dave Divine brought him in from Elko and Dave Divine recommended him as the member.

Mr. Callister: I do not think that is material.

Trial Examiner Myers: What about the motion, do you press your motion?

Mr. Callister: I move to strike as immaterial, incompetent and irrelevant here because it shows at that time he was a member he was not a part of the unit, could have not been.

Mr. Royster: That shows at the time of his initiation.

I haven't got to the question as to whether he is

(Testimony of Glen O. Anderson.)

now a member in good standing and has been since the initiation.

Mr. Callister: It makes no difference when he became a member if he is not tied up with the present unit.

Trial Examiner Myers: Is Hollenback supposed to be in the unit?

Mr. Royster: Yes, he was employed there the month of December, 1944, and he is a part of the unit.

Trial Examiner Myers: I will deny the motion. Not that [63] I am deciding anything at the present time, but it is your contention later he became a part of the Reno division of the Respondent?

Mr. Royster: That is correct.

By Mr. Royster:

Q. Has he been a member in good standing since the date of the initiation, according to your records?

Mr. Callister: If it is according to the records, they should be introduced and made a part of the record.

By Mr. Royster:

Q. Has he been a member in good standing since the date of his initiation?

Mr. Callister: That is calling for a conclusion and not the best evidence. The records are the best evidence.

Mr. Royster: Here is a man that is a Business Representative.

(Testimony of Glen O. Anderson.)

Trial Examiner Myers: Are you going to withdraw the question?

Mr. Royster: No.

Trial Examiner Myers: Read the question, please?

(Question read by the Reporter).

Trial Examiner Myers: I will sustain the objection.

By Mr. Royster:

Q. Do your records show the standing off the various individual members of the Union?

A. Yes, they show it.

Mr. Callister: Just a minute, yes or no.

By Mr. Royster:

Q. Will your records show the standing [64] of G. W. Hollenback since his initiation?

A. Yes.

Q. What do your records show?

A. Shows——

Mr. Callister: (Interposing) Just a moment. If he has the record here, I do not want to be technical, but I think he should introduce them and let the records speak for themselves.

Trial Examiner Myers: Overruled.

(Continuing) Shall I read from the record?

Trial Examiner Myers: Answer the question.

Will the Reporter read the question?

(Question read by the Reporter.)

(Continuing) Shows continuous membership up

(Testimony of Glen O. Anderson.)

until the present date from October 28th, 1944, until today.

Trial Examiner Myers: You mean he has been paying dues regularly?

By Mr. Royster:

Q. Well, now I believe you earlier testified that the date of initiation was August 28, 1944?

A. August 28, 1944.

Q. You just mentioned October 28, 1944.

A. August I meant. 8/28/44.

Q. Do you know A. B. Gandrud? A. Yes.

Q. Is he a member of the International Association of [65] Machinists? A. Yes.

Trial Examiner Myers: What book is that that you have before you?

The Witness: Financial Secretary's dues ledger book.

Mr. Callister: With respect to this last question and answer, will you tell us when he was a member, if he still is?

Mr. Royster: I am going to get to that.

Trial Examiner Myers: Please read the question.

(Question read by the Reporter.)

The Witness: The answer is "Yes."

By Mr. Royster:

Q. Do you know when he joined the International Association of Machinists?

A. He was taken in as a member on February 4, 1942.

(Testimony of Glen O. Anderson.)

Mr. Callister: Mr. Examiner, I wonder if I at this time in order to clear up my questions here can interrogate the witness as to what these books are. I think I should have that right.

Trial Examiner Myers: You may.

Cross Examination

By Mr. Callister:

Q. Mr. Anderson, what books are you referring to there?

A. The Financial Secretary's dues ledger records.

Q. Of what Local? [66]

A. Of the International Association of Machinists.

Q. Located where?

A. United States and Canada or England.

Q. Do you mean to tell me these records here show the dues of everybody in the United States who is a machinist?

A. Shows the dues of the members working in our locality.

Q. All right, now, isn't this true, Mr. Anderson: these records are the records of the Local at Vegas and not at Reno?

A. These are Local 845 records.

Q. That is correct, and Local 845 is the Machinists Local at Vegas, isn't that right? It is, or it isn't.

A. It is its jurisdiction.

Q. Please answer the question, Mr. Anderson. Are these the records of the Local Lodge at Vegas? It isn't a laughing matter. This is serious, frankly.

(Testimony of Glen O. Anderson.)

A. The question is laughing.

Trial Examiner Myers: Wait a minute. Answer the question.

A. It is not confined to Las Vegas.

Mr. Callister: All right, now, if these are not the records of Local 845, what Local are they the records of?

The Witness: They are the Local records of Local 845.

Trial Examiner Myers: Both books that you have there? [67]

The Witness: Yes.

By Mr. Callister:

Q. Now, you have been in your testimony this morning referring in respect to Mr. Gandrud and in respect to Mr. Hollenback, you have been referring to these records which are the records of Local 845, are they not?

A. Of the International Association of Machinists.

Q. Yes, and when you say they have been paying dues, they have been paying dues to Local 845 at Vegas. That is correct, is it not?

A. And to the International Association of Machinists.

Q. That is right; but 845, is that right?

A. Not confined to 845. The dues are paid through a Local for the International.

Q. Well, Mr. Anderson, isn't this true——

Trial Examiner Myers: Let us not get into an argument.

(Testimony of Glen O. Anderson.)

Mr. Callister: I think this is true, I think the statement made by Mr. Anderson is not correct.

Trial Examiner Myers: Just ask him about these books now.

Mr. Callister: I will take this later on, thank you.

Redirect Examination

By Mr. Royster:

Q. Has Mr. Gandrud been in good standing with the International Association of Machinists since the date of his initiation? A. Yes. [68]

Trial Examiner Myers: You mean he has been paying dues ever since?

The Witness: Yes.

Mr. Callister: Now, at this time, Mr. Examiner, I move to strike his testimony in respect to Mr. Gandrud and Mr. Hollenback on the ground that it is immaterial, incompetent and irrelevant, that the Local 801 is supposed to be the Union claimed to be the designated bargaining agent, and the mere fact that they pay it to another Local cannot have any materiality here.

Trial Examiner Myers: Motion denied.

By Mr. Royster:

Q. Mr. Anderson, did you meet with Mr. J. W. Wells about the 16th of May, 1944?

A. Very definitely yes.

Q. Where did this meeting take place?

A. At Wells' office at Henderson.

Q. Where is that near?

A. Near Las Vegas.

(Testimony of Glen O. Anderson.)

Q. Who attended the meeting?

A. J. W. Wells, T. E. McShane, International Representative of Machinists, and myself as representing the Machinists

Trial Examiner Myers: When did you say this meeting took place?

The Witness: May 16th, 1944.

By Mr. Royster:

Q. Now, do you recall what took place at [69] the meeting, what conversations were had?

A. The first part of the meeting was the signing of the Wells——

Mr. Callister: (Interposing) Just a moment, I think we should have the conference, what you said.

Trial Examiner Myers: Tell us what was said and what was done, will you please?

The Witness: That would take two or three hours.

Trial Examiner Myers: Go ahead.

Mr. Callister: I think he should, Mr. Royster, tell us what conversations you want, what point.

Mr. Royster: You object to my leading a witness.

Trial Examiner Myers: Will you please tell us everything you remember was said there, what was done?

The Witness: We came in, we discussed the final signing of the Wells agreement.

Trial Examiner Myers: What agreement was that?

(Testimony of Glen O. Anderson.)

The Witness: That was the Wells—you got me on the names of these.

Trial Examiner Myers: Covering what men, what division?

The Witness: Wells Cargo, Inc. agreement.

Trial Examiner Myers: That hasn't anything to do with the people involved in this case, has it? Did you talk about the people involved in this case?

The Witness: Yes. [70]

Trial Examiner Myers: Tell us about that conversation.

The Witness: After the signing of the agreement we presented him a copy, identical copy of the agreement for the Reno shop, and we discussed the clauses of the agreement, and an arrangement was made that we should——

Mr. Callister: Just a minute. I object to that on the grounds——

Trial Examiner Myers: Don't break in. Let him go ahead, and if you have anything you want to strike out, strike it out.

Don't tell us any conclusions, tell us what you remember was said. We will draw our own conclusions.

The Witness: The agreement was discussed regarding the employees, the working conditions of employees at the Reno shop for the International Association of Machinists and the conclusion was——

Trial Examiner Myers: Never mind what the

(Testimony of Glen O. Anderson.)

conclusion was. Who said what, that is what we want to know.

You gave him an agreement and what was said about the agreement?

The Witness: We discussed each paragraph of the agreement and we had our suggestions and he made his suggestions as to type or the clauses of the agreement for the Reno shop, and the matter of overtime and hours dragged into quite a lengthy discussion and it was agreed that we would meet later in Reno [71] approximately fifteen days, ten or fifteen days later to meet with the balance of the Wells brothers to go into further negotiations.

By Mr. Royster:

Q. Well, now, did you meet with the Wells brothers fifteen days or so later?

A. Approximately around the 3rd of June is as close as I can remember the date.

Q. Did you meet with the Wells brothers at that time?

A. We met with—I can't, at that time I couldn't tell the difference between——

Trial Examiner Myers: Yes or no, did you meet with them?

The Witness: Yes.

By Mr. Royster:

Q. Where did that last meeting take place?

A. Wells' office in Reno.

Mr. Royster: I believe that is all.

Trial Examiner Myers: Any questions, Mr. Callister?

(Testimony of Glen O. Anderson.)

Mr. Callister: Yes.

Recross Examination

By Mr. Callister:

Q. On the 16th day of May, 1944, Mr. Anderson, when you met with Mr. Joe Wells, did you have any authorizations with you at that time showing the employees that designated Local 801 as bargaining agent?

A. We had the——

Q. (Interposing) Did you have them with you at that time? [72]

A. They were not presented to Wells, no. We told him they were members.

Q. I didn't get that.

A. We told him they were members or applicant members. All of his employees at his Wells Reno operation shop.

Q. You mean you had authorizations signed which are identical with Exhibit Board's 2(c)?

A. We did not present——

Q. (Interposing) Did you have these signed by the employees on May 16, 1944, which are identical with Board's 2(c)?

A. No, we had our financial records.

Q. Now, did you ever have any of these prior to June 3, 1944?

A. Not that I remember.

Q. I see. So then on May 16, 1944, you did not have authorizations comparable with Exhibit 2(c), isn't that correct? A. No.

(Testimony of Glen O. Anderson.)

Q. It is not correct? A. No.

Q. Did you have these then?

A. Not those.

Q. Listen to the question. I want to know whether you had on May 16th, when you saw Mr. Wells, authorizations comparable——

Trial Examiner Myers: He doesn't know the word [73] "comparable."

Mr. Royster: I object to the form of the question.

Trial Examiner Myers: Use another word.

By Mr. Callister:

Q. Did you have on May 16, 1944, slips which read in substance and effect as Exhibit 2(c)?

A. We did not have them with us.

Q. Did you have them signed at that time?

Mr. Royster: If you know.

A. Membership applications were signed, yes.

By Mr. Callister:

Q. I am asking you about 2(c), Mr. Anderson. Did you have this type?

Trial Examiner Myers: You mean whether they designated 801?

Mr. Callister: That is right. The reason I referred to 2(c), I have the record straight.

Trial Examiner Myers: He has not read them.

The Witness: Can I say something off the record?

Trial Examiner Myers: Not off the record, but on the record.

(Testimony of Glen O. Anderson.)

The Witness: Our membership applications state practically the same thing. The reason the argument is continuing is that they state practically the same thing.

By Mr. Callister:

Q. But you didn't have—read this 2(c), will you?

A. "I hereby designate——" [74]

Q. (Interposing) Read it to yourself.

Do you know what it means?

A. I sure do.

Q. Did you have anything such as that signed on May 15th by the employees of the Reno division?

A. Yes, they were signed.

Q. Where are they now?

A. They should be in the files of the International Association of Machinists.

Mr. Callister: If the Examiner please, at this time on behalf of Respondent I make demand for them, I feel they are material.

Trial Examiner Myers: You are making a demand of me?

Mr. Callister: No, the witness.

The Witness: I don't have them with me.

Mr. Callister: Can you secure them?

The Witness: I am quite sure I can.

Mr. Callister: When?

The Witness: I can't answer that question, unless I can talk to somebody; I don't know.

Mr. Royster: Well, I do not think the demand is well taken. Mr. Callister is trying to knock

(Testimony of Glen O. Anderson.)

down a straw man here. There has not been any evidence.

Trial Examiner Myers: If they want to produce them they can produce them. You haven't anything to do with that. [75]

Mr. Royster: All right.

Trial Examiner Myers: Any other questions?

Mr. Callister: That is all.

Trial Examiner Myers: Any redirect?

Mr. Royster: No redirect.

Trial Examiner Myers: Mr. Apperson?

Mr. Apperson: No questions.

Trial Examiner Myers: You are excused, sir, thank you very much.

(Witness excused.)

Trial Examiner Myers: Will you call your next witness, Mr. Royster?

Mr. Royster: My next witness will run for quite a while.

Trial Examiner Myers: How long?

Mr. Royster: An hour.

Trial Examiner Myers: We will stand adjourned now until 1:30.

(Thereupon, at 12:30 p.m. a recess was taken until 1:30 o'clock p. m.) [76]

After Recess

(Whereupon the hearing was resumed, pursuant to the recess, at 1:45 o'clock p.m.)

Trial Examiner Myers: Are you ready, gentlemen?

Mr. Callister: We are, Mr. Examiner.

Mr. Royster: Mr. McShane.

T. E. McSHANE

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: T. E. McShane.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: Mc S-h-a-n-e.

Trial Examiner Myers: Where do you live, Mr. McShane?

The Witness: I live in Rialto, California.

Trial Examiner Myers: You may be seated, sir.

You may proceed, Mr. Royster.

By Mr. Royster:

Q. What is your occupation, Mr. McShane?

A. I am a representative of the International Association of Machinists.

Q. How long have you been so employed?

A. I have been so employed since January 1, 1940. [77]

Q. What are your duties?

A. My duties are to represent the Machinists Union in all matters pertaining to Union business in any place that they have need of representation.

(Testimony of T. E. McShane.)

Q. Is your authority to represent employees limited in any respect?

A. My authority to represent the employees of the organization is not limited in any way.

Q. When I spoke of employees I meant employees who are members of the International Association of Machinists.

A. That was what I answered for. I was also referring to members of the International Association of Machinists.

Q. Do you know J. W. Wells?

A. I do.

Q. Did you have a meeting with him on May 16, 1944?

A. I did.

Trial Examiner Myers: Is that John Wells, President?

Mr. Royster: Joe Wells.

Trial Examiner Myers: President of the Respondent?

Mr. Royster: That is correct.

By Mr. Royster:

Q. Where did this meeting take place?

A. The meeting was held in Wells offices at Henderson, Nevada, which is near Las Vegas, Nevada.

Q. Who was present at this meeting?

A. Joe Wells, Glen Anderson, and myself. [78]

Q. What was the occasion of the meeting?

A. The meeting covered two subjects: the first part of the meeting, the final signing of an agreement for one of the Wells operations was completed.

(Testimony of T. E. McShane.)

Then the second phase covered was my asking Joe Wells at that time to negotiate for the Reno employees which he had stated that he would negotiate for them after we signed the agreement for the Wells Cargo ore haul.

Q. Well, what was said with respect to the Reno employees?

A. I asked Mr. Wells to negotiate for the Reno employees using the agreement that we had just signed as a basis for the negotiation for the Reno employees.

Q. Did you discuss the unit?

A. The unit was understood between both Wells——

Mr. Callister: (Interposing) Just a minute. Just what you said and what he said, not what you understood.

The Witness: The unit was known to both parties.

Mr. Callister: I want the conversation. I think that is what we should have.

Trial Examiner Myers: Tell us what was said regarding the unit, if anything.

The Witness: The unit was to——

Mr. Callister: What did you say and what did he say.

Trial Examiner Myers: Don't instruct the witness, just object. [79]

The Witness: I told them that the unit that we wished to represent was the same unit that we had just represented in the other agreement.

(Testimony of T. E. McShane.)

Q. (By Mr. Royster) What was that unit in the other agreement?

A. That was mechanics, their helpers, and the classification of machinist Diesel specialists, which classifications covered all the employees.

Q. What there any conversation with respect to your representing a majority of the Reno employees?

A. They did not question at that time whether we represented the employees or not.

Q. Did you make any representations to Mr. Wells with respect to a claim of majority?

A. I told Mr. Wells that the employees of the Wells Company in Reno, in their operation, a majority of them were members of the Machinists organization, and that we desired to negotiate the agreement for them and that was not questioned by Mr. Wells.

Q. Was there any discussion of wages?

A. The wage was discussed, and Mr. Wells informed us that the wages paid in Las Vegas which we were asking for were prohibitive on this operation.

Q. Let me see if I understand your answer.

Is it that he could not pay the same wages at Reno that he was paying at Las Vegas? [80]

A. That is correct.

Q. Well, can you tell us anything further in the way of conversations that took place at this meeting?

A. Mr. Wells stated that he could not at that

(Testimony of T. E. McShane.)

time negotiate the agreement but that he would meet at a later date for the purpose of negotiating an agreement covering the Reno employees.

Q. Was there any agreement with respect to a date for the subsequent meeting.

A. There was no definite date set at that time for a future meeting. There would be a meeting at a later date.

Q. Did you have the meeting at a later date with Mr. Wells?

A. Not as a result of that meeting.

Q. Did you make any attempt to have a meeting at a later date?

A. I made several attempts to meet with Joe Wells and made several attempts to meet with the other two Mr. Wells, Mr. Howard Wells and Mr. Bob Wells, and did meet with them at a later date.

Q. Did you have any correspondence with Mr. Joe Wells with respect to a meeting?

A. In August I believe about the first part of August I sent Mr. Wells a letter notifying him that we did represent all of his people and sent the letter as an official request to sit down and negotiate the agreement. [81]

Mr. Royster: Will the Reporter mark this as Board's Exhibit 5 for identification.

(Thereupon the document above referred to was marked Board's Exhibit No. 5 for identification.)

Q. (By Mr. Royster) I show you what purports to be a copy of a letter addressed to Mr. Joe

(Testimony of T. E. McShane.)

Wells and bearing the typewritten signature of T. E. McShane, and ask if you can identify it?

A. That is the copy, this is a copy of the letter that I wrote and mailed to Mr. Wells at the address indicated.

Q. Did you place the original of this letter in an envelope? A. I did.

Q. Did you address it? A. I did.

Q. To where did you address it?

A. To Mr. Joe Wells at Las Vegas, Nevada.

Q. Did you place postage on the letter?

A. I did.

Q. What did you do with it?

A. I dropped it in the mail box in the post office at Reno.

Mr. Royster: I offer Board's Exhibit 5 for identification in evidence.

Trial Examiner Myers: Any objection?

Mr. Callister: No, we have no objection.

Trial Examiner Myers: There being no objection, the [82] paper is received in evidence, and I will ask the Reporter to please mark it Board's Exhibit No. 5.

(The document heretofore marked Board's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. Royster) Did you receive a reply to Board's Exhibit 5? A. I did not.

Trial Examiner Myers: You mean a written reply?

(Testimony of T. E. McShane.)

Q. (By Mr. Royster) A written reply, or any kind of a reply?

A. I did not receive a reply of any nature to that letter.

Q. Did you meet with Howard and Bob Wells in September, 1944? A. I did.

Q. Where did this meeting take place?

A. It took place in the offices of the Reno shops here in Reno, Nevada, the Wells shops.

Q. Who was present other than those I have named?

A. Both Bob and Howard Wells.

Trial Examiner Myers: Could you fix the time a little better, what part of September?

The Witness: I have no written record of the date of that meeting, but as near as I can recall it was in the latter half of September.

Q. (By Mr. Royster) What year? [83]

A. 1944.

Q. Who was present at this meeting?

A. Mr. Bob Wells, Mr. Howard Wells, Mr. Glen Anderson, and myself.

Q. Was George McKay present at this meeting?

A. I beg your pardon, it was George McKay present instead of Anderson.

Q. Was there conversation at this meeting?

A. There was conversation.

Q. Can you tell us what it was?

A. Mr. McKay and I appeared at the Wells office and asked to see the Mr. Wells, and after waiting a few minutes we were escorted into the room where the two Mr. Wells were.

(Testimony of T. E. McShane.)

Q. Will you state again at this point which of the Wells you mean?

A. Mr. Howard and Mr. Bob.

Q. Continue.

A. I stated what our purpose was there, that we wished to negotiate an agreement covering our employees there, our members who were employed there. I presented them with the proposed agreement. One of the Mr. Wells, I wouldn't say for sure which one it was, took the agreement and read part way through it and he informed us that the wages we were asking were too high, that they would shut up and would have to shut their business up if they had to pay that kind of [84] wages.

The unit was not discussed and the representation was not questioned.

Q. Did you make any offer to prove a majority?

A. At that time we told them that we would submit proof that we represented these people.

Q. But you did not actually submit it at this meeting?

A. We did not submit it at that meeting, that is correct.

Q. Was there any mention of Joe Wells at this meeting?

A. We were informed, I was informed by one of the Mr. Wells that they were not authorized to sign Union agreements and that would have to be done by Mr. Joe Wells, who was President of the Company.

(Testimony of T. E. McShane.)

Trial Examiner Myers: Did you leave the agreement with them?

The Witness: The agreement was left there.

Q. (By Mr. Royster) Did you meet with Joe Wells on October 5, 1944? A. I did.

Q. Where did this meeting take place?

A. In the Wells office at Henderson, Nevada, near Las Vegas.

Q. Who was present?

A. Mr. Joe Wells, Mr. Glen Anderson, and myself.

Q. Were there conversations at this meeting?

A. There was conversation at that meeting. [85]

Q. Will you give us your recollection of the conversations?

A. Mr. Anderson and I appeared at the Wells office and asked to see Mr. Wells and we were granted the opportunity, and we went into the office, Mr. Wells' office, and we presented Mr. Wells with an agreement which was identical to the one that had been negotiated by them before covering the other operation.

Trial Examiner Myers: What other operation?

The Witness: The Wells Cargo operation.

Trial Examiner Myers: Was that the same agreement that you presented to him on May 16, 1944?

The Witness: That is correct, the same agreement. Mr. Wells looked at it a minute and he said, "You said you would give proof of representation of your people," and we presented the author-

(Testimony of T. E. McShane.)

izations, and—is it permissible to use the language he used?

Trial Examiner Myers: Certainly.

The Witness: He looked the authorizations over and he said: “Hell, you’ve got everybody on there but me.”

“Oh,” I said, “well, we are not going to discriminate against you. You can sign one of them too.”

So he laughed and he looked the agreement over and we started talking, and he said: “This paragraph is O.K.”

Trial Examiner Myers: Did he refer to any particular paragraph? [86]

The Witness: He started at the first of the agreement, and paragraph after paragraph, as we went down he said, “These are O.K.”, until we came to the overtime provision. At that time Mr. Wells stated that he would not, he informed us that his operation was under the jurisdiction of the ICC, and that he did not have to pay overtime over eight hours or over forty, and would not. So I told Mr. Wells that I would present signed agreements as proof that trucking industries similar to him did pay overtime for over eight hours and forty hours, and he asked me to produce that evidence. I had that evidence in the form of copies of signed agreements between our Union and other trucking industries.

Trial Examiner Myers: That is what you said to him?

(Testimony of T. E. McShane.)

The Witness: I showed him copies.

Trial Examiner Myers: You showed him copies?

The Witness: That is right, we had them there.

Trial Examiner Myers: How many did you show him?

The Witness: I think we had three at that time, two or three. However, I told him that I would get more.

Mr. Wells at that time sat there and studied a minute and he said, "Well, the boys in Reno are going to have to operate that business," and he said, "I am not going to tie them up to any conditions without them being in on the deal." And he says, "I will meet you in Reno in about ten [87] days and at that time in company with Bob and Howard we will resume negotiations."

Q. (By Mr. Royster) Now, was there anything said during this meeting of October 5th with respect to a bargaining unit? A. There was.

Q. Will you tell us what was said?

A. I informed Mr. Wells that the bargaining unit that we wished to represent had been changed a little since the first time that we had talked to him on account of an operation that was a little different than it was at that time, which was a body shop that they had opened up in the meantime. I told him that we also represented those people in the body shop and wished to include them in the unit. Mr. Wells says, "What will you call them?" And I said, "They will all be mechanics." He asked what wage rate we would demand for them and we

(Testimony of T. E. McShane.)

told him that the wage rate of them would be the same as a journeyman mechanic.

Q. Did you tell Mr Wells the classifications of employees at Reno that you claimed to represent?

A. We did. We told them.

Trial Examiner Myers: At what meeting?

The Witness: At this that we are still talking about, the October meeting.

Mr. Wells objected to one classification that we were [88] asking to represent and that was the classification of machinist Diesel specialist. He didn't think that that should be brought up to this operation. We told him then that we would ask to represent mechanics, automotive machinists, their helpers, and that we would ask to include all the people in the shop who were doing mechanical work in the body shop as mechanics.

Q. (By Mr. Royster) Was this definition given orally?

A. That definition was given orally, yes, at that meeting, that definition was given orally.

Trial Examiner Myers: Did that include the Diesel specialist?

The Witness: We agreed to discontinue the Diesel specialist.

Trial Examiner Myers: You agreed to forget jurisdiction over the Diesel specialist?

The Witness: We agreed to change the classification to automotive machinist.

Trial Examiner Myers: In other words, you

(Testimony of T. E. McShane.)

mean that you agreed to exclude the Diesel specialist from the unit?

The Witness: We did not wish to exclude him, we merely changed the name of the classification from machinist Diesel specialist to automotive machinist.

Trial Examiner Myers: How many were there, approximately? [89]

The Witness: I would say there would be two.

Trial Examiner Myers: What did Mr. Wells say about that?

The Witness: Well, he did not agree to it or he didn't disagree to it.

Trial Examiner Myers: Did he say anything about it?

The Witness: He said that would have to be figured out at a later meeting, that it would be discussed.

Q. (By Mr. Royster) Now, when you say that it had to be figured out at a later meeting, it had to be discussed, what did you have in mind, what had to be discussed?

Mr. Callister: We object to it on the ground as calling for a conclusion.

Trial Examiner Myers: I will sustain the objection.

Q. (By Mr. Royster) What was there that remained for discussion at another meeting?

A. According to Mr. Wells' objections to the things he objected to that we asked for, it was the wages, the overtime provisions of the agreement.

(Testimony of T. E. McShane.)

and the one classification which was machinist Diesel specialist.

Q. Let me see if I understood this clearly. Is it your testimony that Mr. Wells objected to having such a classification in his Reno shop as machinist Diesel specialist? A. That is correct.

Q. Is it also your testimony that you agreed that such a [90] classification would not be imposed on any contract entered into covering Reno employees?

A. We agreed that if we could substitute the automotive machinist instead of the machinist Diesel specialist.

Q. At the close of the meeting there was actually no agreement?

A. There was no agreement.

Q. On that point?

A. On that point, that is correct.

Mr. Royster: Will the Reporter mark this as Board's Exhibit 6 for identification?

(Thereupon the document above referred to was marked Board's Exhibit No. 6 for identification.)

Q. (By Mr. Royster) I show you Board's Exhibit 6 for identification, Mr. McShane, and ask you if you recognize it?

A. This is the agreement that we asked him to sign a duplicate agreement for Reno with the exception of the wage scale.

Q. What is the document itself if you know?

(Testimony of T. E. McShane.)

A. This is the bargaining agreement between the Wells Cargo, Inc. and the International Association of Machinists, signed between the Company and the International Association of Machinists, signed for the Company by J. W. Wells, and for the Machinists by Glen O. Anderson and myself.

Trial Examiner Myers: When?

The Witness: On the 16th day of May, 1944.

Mr. Royster: I offer Board's Exhibit 6 for identification in evidence.

Trial Examiner Myers: Any objection?

Mr. Callister: Yes, we object to it on the ground it is immaterial, incompetent and irrelevant.

Trial Examiner Myers: What do you want to prove by that paper.

Mr. Royster: I am going to show it to him after it has been admitted and ask him to point out the paragraphs upon which it appears from his testimony there was agreement to cover the Reno shop during this meeting of October 5th.

Trial Examiner Myers: Is that the only purpose?

Mr. Royster: Yes.

Trial Examiner Myers: Any objection to that limited purpose, Mr. Callister?

Mr. Callister: Now, state your purpose again, please, if you will.

Mr. Royster: My recollection of this witness' testimony is that he showed that agreement to Joe Wells on October 5th and said, "We want this same agreement in Reno to cover the Reno shop." And

(Testimony of T. E. McShane.)

he said that Joe Wells went down and said, "That is all right." And he come to a certain point, and he said, "I don't agree to this." And if his recollection is sufficient to do so, I want him to testify as to what portions of that contract Mr. Wells indicated he would agree to to [92] cover Reno and also I want this in for the purpose of showing that this was the document which was offered to Joe Wells on October 5th as the agreement that they wanted to have in Reno.

Mr. Callister: We make the same objection, Mr. Chairman.

Trial Examiner Myers: Why? What is the basis for your objection?

Mr. Callister: This is an agreement between an entirely different outfit. Now, if this is an agreement—do I understand this agreement was presented to Mr. Wells, is that the purpose of it?

Mr. Royster: Yes, that is my understanding of the testimony.

Mr. Callister: We have no objection for that limited purpose.

Trial Examiner Myers: Very well, there being no objection the paper is received in evidence, and I will ask the Reporter to please mark it as Board's Exhibit No. 6.

(The document heretofore marked Board's Exhibit No. 6 for identification was received in evidence.)

Trial Examiner Myers: The paper is received

(Testimony of T. E. McShane.)

in evidence only for the purpose as stated by Mr. Royster.

Q. (By Mr. Royster) Now, I show you Board's Exhibit 6, Mr. McShane, and ask if you can point to those paragraphs which as you testified Mr. Wells indicated he would agree in [93] a contract covering the Reno shop.

Mr. Callister: Just a minute, I think the government here is putting words in the witness' mouth. That is not in evidence. I think the preface of that question should be stricken. I think the question should be reframed.

Trial Examiner Myers: I will sustain the objection.

Tell us what was said about that contract by Mr. Joe Wells.

The Witness: When we presented it to him he looked it over, he knew it was——

Trial Examiner Myers: Never mind, what did he say about it?

The Witness: He said, "I don't see anything wrong with this or this." And he went over the Articles here and read them until he got down——

Trial Examiner Myers: To what Article, what is the designation of the Article, 1, 2 or what?

The Witness: Until he got to Article 4, where it states the standard work day and week.

Trial Examiner Myers: Go ahead, Mr. Royster.

Q. (By Mr. Royster) Was that, was there objection raised to other portions of that agreement?

A. There was no objection raised at that time to

(Testimony of T. E. McShane.)

anything with the exception of that and the wages that we told him that we asked for. We asked him for the same wage that was [94] contained in this agreement and he again stated——

Q. (Interposing) Under what paragraph, the same wage contained in that agreement under what paragraph?

A. Under Article 8.

Trial Examiner Myers: This is the contract that is in evidence as Board's Exhibit 6?

The Witness: That is correct. Designated as minimum wage scale.

Trial Examiner Myers: Go ahead, Mr. Royster.

Q. (By Mr. Royster) Now, you testified, Mr. McShane, that during the meeting of October 5th Mr. Joe Wells said that he and Howard and Robert Wells would meet with you in Reno in about ten days.

A. Mr. Wells stated that he had to go some place and would not be able to get back for about ten days and that he would meet with the Machinists' representative, including myself and his two brothers for the purpose of negotiating an agreement.

Q. Well, now, did such a meeting take place?

A. That meeting did not take place.

Q. Did you come to Reno?

A. I came to Reno and Mr. Wells did not appear for the meeting.

Trial Examiner Myers: That is Mr. Joe Wells?

The Witness: Mr. Joe Wells. [95]

(Testimony of T. E. McShane.)

Q. (By Mr. Royster) When did you come to Reno?

A. I came to Reno three or four days after the 5th, which would be about the 10th, between the 8th and 10th of October, and I stayed there until the first of November.

Trial Examiner Myers: The first of November, did you say?

The Witness: The first of November, that is correct.

Q. (By Mr. Royster): Did you see Mr. Joe Wells during that period?

A. Mr. Joe Wells came through Reno on his way to a fishing trip or hunting trip I believe. I saw him one time and he stated that he could not be back for quite a while and went on the trip without any negotiations whatever, just a few minutes conversation.

Trial Examiner Myers: Where did you see him?

The Witness: In front.

Trial Examiner Myers: I mean what town?

The Witness: Reno.

Trial Examiner Myers: Could you fix the time when that was?

The Witness: I cannot fix the exact date.

Trial Examiner Myers: What is the approximate date?

The Witness: I believe it was between—I can't say definitely whether it was in September or October.

Trial Examiner Myers: Well, was it before you

(Testimony of T. E. McShane.)

had that talk in Las Vegas on October 5th or after that? [96]

The Witness: I can't definitely say whether it was or not. I do not remember.

Q. (By Mr. Royster) At any rate you testified that there was some understanding that about ten days after October 5th there would be a meeting in Reno? A. That is right.

Q. You came to Reno for what purpose?

A. To fill that meeting.

Q. Did you have such a meeting?

A. We did not.

Mr. Royster: Will the Reporter mark this as Board's Exhibit 7 for identification?

(Thereupon the document above referred to was marked Board's Exhibit No. 7 for identification.)

Q. (By Mr. Royster) I show you Board's Exhibit 7 for identification and ask if you can identify it?

A. I can. That is a telegram that I sent to Mr. Joe Wells at Las Vegas, Nevada, on October 30th informing him——

Q. (Interposing) You do not have to go into the subject matter of the telegram at the moment.

From where did you send that telegram?

A. Reno, Nevada.

Q. To where? A. Las Vegas, Nevada.

Q. By what service did you send it? [95]

A. Western Union.

Q. Did you file it at the Western Union office here in town? A. I did.

(Testimony of T. E. McShane.)

Q. Did you pay the charges?

A. I did.

Q. Did you ever receive any notification with respect to the delivery or non-delivery of the telegram?

A. I received an answer from this telegram.

Mr. Royster: I offer Board's Exhibit No. 7 for identification in evidence.

Trial Examiner Myers: Any objection, Mr. Callister?

Mr. Callister: No objection.

Trial Examiner Myers: There being no objection, the paper is received in evidence, and I will ask the Reporter to mark it as Board's Exhibit No 7.

(The document heretofore marked Board's Exhibit No. 7 for identification was received in evidence.)

Q. (By Mr. Royster) Now, you testified, Mr. McShane, that you received a reply to this telegram.

Will the Reporter please mark that as Board's Exhibit 8 for identification?

(Thereupon the document above referred to was marked Board's Exhibit No. 8 for identification.)

Q. (By Mr. Royster) I show you Board's Exhibit 8 for [98] identification and ask you if you can identify it?

A. That is the answer I received from Joe Wells in answer to my telegram just sent prior.

(Testimony of T. E. McShane.)

Mr. Royster: I offer Board's Exhibit 8 for identification in evidence.

Trial Examiner Myers: Any objection?

Mr. Callister: No objection.

Trial Examiner Myers: There being no objection, the paper is received in evidence, and I will ask the Reporter to please mark it as Board's Exhibit No. 8.

(The document heretofore marked Board's Exhibit No. 8 for identification was received in evidence.)

Trial Examiner Myers: What is Mr. Joe Wells' middle initial? Is it W. or A.?

Mr. Callister: W.

Q. (By Mr. Royster) Now, what, if anything, did you do after receiving Mr. Well's wire, which is in evidence as Board's Exhibit 8?

A. When I received that telegram from Mr. Wells, feeling that he wasn't acting as he had promised he would, I sent the telegram to E. P. Marsh of the Conciliation Service of the United States Department of Labor, asking for the services of a Conciliator in the dispute.

Q. Was a Conciliator assigned?

A. There was a Conciliator assigned. It was Conciliator [99] Adolph Hoch.

Q. Did you meet with the Conciliator?

A. I did.

Q. Where? A. In Reno.

Q. When? A. November 6th.

(Testimony of T. E. McShane.)

Q. Of what year? A. 1944.

Q. What developed, what, if anything, developed from that meeting?

A. The Commissioner of Conciliation Hoch contacted the Wells Company and was informed——

Q. (Interposing) Just a minute. Did you go with Mr. Hoch to the Wells Company?

A. Mr. Hoch called on the Wells Company before I went with him.

Q. On any occasion did you go with Mr. Hoch to the Wells Company?

A. I called at the Wells Company the following day in company with Mr. Hoch, but there was nothing transpired.

Q. Well, did you meet on that day with any of the Wells?

A. No meeting with the Wells that I recall.

Q. Now, did Mr. Hoch continue to be the Conciliator in this case? [100]

A. Mr. Hoch acted as Conciliator in contacting Mr. Joe Wells and was informed by Mr. Wells that instead of meeting in the Southern part of Nevada or the Southern part of California, that he desired to meet in Reno instead and Mr. Hoch asked that a different Conciliator be assigned to the case, which was done, Conciliator Curtin was assigned to the case instead of Mr. Hoch.

Q. Did you have a meeting with the Conciliator, Conciliator Curtin? A. We did.

Q. When did that meeting take place?

(Testimony of T. E. McShane.)

A. As I recall that meeting, it was on December 22nd.

Q. Of what year? A. 1944.

Q. Where was this meeting held?

A. This meeting was held in the Wells offices in Reno.

Q. Who was present?

A. Mr. Howard Wells, Mr. Joe Wells, the Conciliator Curtin and myself.

Q. Were there conversations at this meeting?

A. There were conversations, yes.

Q. Will you give us your recollection of these conversations?

A. Mr. Curtin, Commissioner Curtin informed the Wells the purpose of calling them and discussion started between Mr. Joe Wells and myself, and I don't recall the discussion [101] word by word, but the things that were discussed was at that time that Mr. Wells then brought up the question, "Do you represent the people?"

We again referred to the authorizations from their employees and Mr. Wells, after studying a while, said, "Well, I guess I will go ahead and negotiate." Which we proceeded to do. However, after discussing, I would say failing to agree on various articles that he had agreed to in Las Vegas, Mr. Wells, at this December 22nd meeting, demanded that we submit a new agreement with an open shop clause and without the overtime clause where it applied to 40 hours and 8 hours per day, and also the rate of pay, and at that time he asked me

(Testimony of T. E. McShane.)

again what unit we petitioned for, and at that time I told him that we still petitioned for the same unit that we had told him about in Las Vegas on October 5th, which would be mechanics, automotive machinists, and welders, the helpers of all classifications, and all the employees in the body shop that were doing mechanical work we considered were all of the employees.

Q. Did Mr. Howard Wells or Mr. Joe Wells or any of the Messrs. Wells who were present make any comment about that unit?

A. Sometime shortly after the meeting started, Mr. Howard Wells got up and left the room. He was gone for a period of time, I do not know the exact period that he was gone for, [102] but in a little while he came back and came into the room and called Mr. Joe Wells out of the room, and Mr. Joe Wells went out of the room and they were gone possibly a half hour, maybe not that long. They were gone quite a little while and during their absence Mr. Curtain got up and walked the floor and said he thought that was a little unusual, he couldn't imagine what they were doing, one thing and another. He seems to be a little dissatisfied about being put on the spot there.

Mr. Callister: Just state the conversation.

By Mr. Royster:

Q. Just what occurred in the presence of the Wells?

A. Mr. Joe Wells came back and said that they had been out and talked with their employees.

(Testimony of T. E. McShane.)

They found out that some of them didn't wish the Union to represent them and that they would not at that time recognize us as representing his employees, but would demand an election before they would go any further.

Trial Examiner Myers: Then what happened?

The Witness: The argument broke out over again, the Commissioner who was conducting the case stated that he thought the authorizations looked authentic and I think he suggested, in fact I know he suggested that they continue with the negotiations, that the actions of the Wells brothers in going out and talking to their employees at that time was [103] rather unbecoming and he suggested that we continue with the negotiations. The Wells brothers refused to do so and at that time they brought up the question of Jack Benton again. Their contention was that Jack Benton was a foreman. The Union's contention was that Jack Benton was a mechanic by the fact that while he did do some of his duties which were of a supervisory nature, that the majority of the duties performed by Jack Benton were that of a journeyman mechanic and he worked with the tools the majority of his time.

The Wells stood on their contention that he was a supervisory employee and did not belong in the Union. One discussion brought on another one and Joe Wells made the statement that Jack Benton was responsible for his employees belonging to the Union, that during the lunch hour he talked it to

(Testimony of T. E. McShane.)

all the employees, talked Union to the employees during the lunch hour and that Mr. Benton was a first class foreman, he did a good job for them and that his work was satisfactory in every way but he still felt that he was the one that was responsible for their employees being members of the Union and wishing to be represented by it.

Q. Was there anything in any of the conversations about Salt Lake City?

A. Mr. Wells stated at one time——

Q. (Interposing) Which Mr. Wells was this?

A. Mr. Joe Wells. [104]

Q. All right.

A. Mr. Joe Wells stated that before that they would submit to any of the conditions that we asked for that he would move his operation to Salt Lake City.

Q. Do you have any present recollection of anything else that occurred at this meeting?

A. At this time I can't recall anything further that transpired at that meeting.

Q. Now, Mr. McShane, I ask you as a Grand Lodge Representative of the International Association of Machinists, have you participated in the negotiation of bargaining agreements with companies other than Wells, Inc.?

A. I participate in the negotiating of agreements with companies through California, Nevada, and wherever we have any occasion to negotiate.

Q. Now, in any of the agreements that you have negotiated, has there been any case where employees

(Testimony of T. E. McShane.)

in the body shop were included in the unit with automotive machinists?

A. In many instances we include the employees of body shops.

Q. Can you name any specific instance?

A. We include the employees of body shops in the Wells operation at Las Vegas for one where they repaired their bodies and done all the work that needed to be done on them.

Trial Examiner Myers: Is that the Wells Cargo?

The Witness: That is the Wells Cargo, yes. We represent [105] and attempt to sign agreements for body workers every place that they work. I will say that some places we are not successful in getting agreements for them, but we do take them into membership and represent them and sign agreements for them.

Mr. Royster: I believe that is all.

Trial Examiner Myers: Any questions, Mr. Callister?

Mr. Callister: I have, sir.

Cross Examination

By Mr. Callister:

Q. Mr. McShane, I assume that during the past four years you have been actively engaged in representing the International Machinists in negotiations and various other matters pertaining to contracts, have you not?

A. Contracts and otherwise.

(Testimony of T. E. McShane.)

Q. That is right. You know about the War Labor Board, do you not, Mr. McShane?

A. About what?

Q. You are familiar with the duties of the War Labor Board, are you not?

A. Quite familiar with it.

Q. My point is, you know, do you not, Mr. McShane, that where you are negotiating a contract and arrived at a point of dispute in respect to terms and conditions, that you call a Conciliator in and he certifies the question in dispute to the War Labor Board. You are familiar with that procedure, [106] are you not?

A. That is correct.

Q. In other words, I assume you have had many cases during the past four years where you have bargained with various companies and have reached disputes and had them certified to the Board and I mean the War Labor Board, is that right?

A. I have.

Q. Now, Mr. McShane, coming back to this April meeting that you refer to with Mr. Wells, at Henderson, Nevada, you went there to have Mr. Wells sign an agreement on behalf of Wells Cargo, did you not? A. That is correct.

Q. Now, is it not true—incidentally as a part of that meeting you brought up or discussed his Reno operation, isn't that right?

A. That is correct.

Q. Now, Mr. McShane, have you ever or do know whether anyone has ever prepared an agree-

(Testimony of T. E. McShane.)

ment that has been presented to the Wells, Inc., which is another corporation from Wells Cargo, as you know, in respect to their Reno operation?

A. I do.

Q. Where is that agreement?

A. That agreement was given to the Wells brothers, Bob and Howard, in their office.

Q. Have you got a copy of it? [107]

A. We have some place a copy of it, yes.

Q. You mean to tell me you came here to a meeting of the hearing of this and did not bring a copy of it with you?

Trial Examiner Myers: Let us not argue.

Mr. Callister: I am sorry, Mr. Examiner.

The Witness: The agreement that was presented to the Wells brothers was a duplicate of that signed agreement and for negotiating purposes on our part we would use that.

Trial Examiner Myers: You are referring to Board's Exhibit 6?

The Witness: I believe it is 6; it is the agreement.

Trial Examiner Myers: Yes.

By Mr. Callister:

Q. Then, Mr. McShane, if I understand you correctly, you did not draw an agreement, but you presented to Wells, Inc., the Respondent here, that pertained solely to their Reno operation, is that correct?

A. May I answer that in the only way it can be answered?

(Testimony of T. E. McShane.)

Trial Examiner Myers: Certainly.

A. The two operations we considered identical from the standpoint of mechanics, so an unsigned copy of that which we had made several copies at the time that we presented this agreement, and it was signed, there were extra copies made up and one of those copies was the one that was presented to the Wells brothers here in Reno as the agreement that we wished to put into effect.

By Mr. Callister:

Q. Now, coming back to your April meeting now.

Mr. Royster: You mean May.

By Mr. Callister:

Q. In respect to this May meeting in Henderson, you stated here a few minutes ago you presented Mr. Wells with an agreement there, is that correct?

A. That is correct.

Q. As a matter of fact, is it not true, Mr. McShane, all you did to him was you signed Exhibit 6 here and you mean to tell me you presented another agreement in addition to Board's Exhibit 6?

A. You want me to tell you just exactly what happened.

Q. That is right.

A. We had three extra blank copies and they were taken out of the brief case and then we asked Joe at that time to start negotiating for the Reno operation on three blank copies that are identical to that.

Q. Well, now, Mr. McShane, this Board Exhibit

(Testimony of T. E. McShane.)

6, I note here there is nothing said about body mechanics. Did you ever present to them a wage scale for body mechanics?

A. They had——

Q. (Interposing) Did you or did you not?

A. The wage scale covering body mechanics is on the last paragraph of that and it was applied to them on this job.

Q. Well, Mr. McShane, did you at any time ever present to [109] the Wells, Inc., a job classification of body builders with a wage scale proposed?

A. We asked for the same wage scale that would be paid to the mechanic.

Q. Now, in this agreement which you say you presented to Howard and Bob Wells in December, I think it was in 1944, did that copy have anything to say about what may be termed body builders, do you recall?

A. That was an exact duplicate of this agreement.

Q. Nothing was said about body builders in there at all?

A. There was something said about body builders. We said we included the body builders in that classification as mechanics.

Trial Examiner Myers: What do you means, in writing? He is talking about orally.

Mr. Callister: I am trying to get that straight.

Trial Examiner Myers: You said "said."

By Mr. Callister:

Q. In respect to Board's Exhibit 6 did you at

any time in writing ever give to the Wells brothers a proposal for body builders?

A. We class a body builder as a mechanic and when we presented the classification of mechanics to Wells brothers that included body builders. That is what they are, they are mechanics.

Q. Well, now, Mr. McShane, was anything ever said at any [110] of these meetings in regard to greasers being included in the unit?

A. There was nothing never said about including greasers in the unit.

Q. Was anything ever said while you were present at any one of these meetings that the Union claimed they represented the greasers?

A. That the Machinists Union represented greasers?

Q. That is right.

A. The only instance where the Machinists would represent a greaser—now, you asked me a question, I have to answer it, you asked it in a way I can't answer it any other way—

Trial Examiner Myers: Read the question.

(Question read by the Reporter.)

A. (Continuing) Mr. Wells mentioned one time that they used an employee who greased trucks part of the time, worked as a mechanical helper part of the time and Mr. Wells was told that if he had an employee who put in over half of his per cent of his time at mechanical work that he would be represented by us.

By Mr. Callister:

Q. Mr. McShane, again I ask you the question,

(Testimony of T. E. McShane.)

you can say "Yes" or "No," was anything ever said by you or by any Union representative while in your presence that they represented the greasers in Wells at Reno?

A. I never made the statement. [111]

Q. Did you hear any Union representative make that statement?

Mr. Royster: Just a moment. I think that question of Mr. Callister should be limited to conversations where one of the Wells brothers was present.

Mr. Callister: I will waive the hearsay side. I am asking if Mr. McShane ever heard anything.

Trial Examiner Myers: By Union representatives to one of the representatives of the Respondent.

Mr. Callister: That is understood.

Mr. Royster: I am not sure the witness understood.

Trial Examiner Myers: We are talking about these meetings all the time.

Mr. Royster: That is right, I wanted to have that clear.

Trial Examiner Myers: When you said Mr. Wells, did you mean Joe Wells just now when you were talking about greasers when he told you about one greaser spending some time on a greasing job?

The Witness: I beleive it was Joe Wells. Anyway it was called to my attention that we did have one employee, I believe, that sometimes worked, did some greasing and then in addition to that he worked as a mechanic's helper.

(Testimony of T. E. McShane.)

By Mr. Callister:

Q. Mr. McShane, I will ask the question again. I do want an answer. I think it is material, [112] Mr. Examiner.

If you do not understand it, Mr. McShane, you tell me. Did you ever hear a representative of your organization while in your presence at these meetings ever say that they claimed the greasers in this unit? A. No.

Q. Now, Mr. McShane, do you know how it came about that your organization represented to the National Labor Relations Board representatives that you did represent the greasers in this unit? Do you know how that came about?

Mr. Royster: I object to the form of the question.

Trial Examiner Myers: I will sustain the objection.

By Mr. Callister:

Q. Now, Mr. McShane, as I recall, you testified that you advised Mr. Wells on May 16th that you represented a majority of his employees in Reno?

A. That is correct.

Q. Did you have signed authorizations with you at that time as Mr. Anderson so testified here this morning?

A. Do I have to answer a question that I don't think anybody testified to? I never heard anybody testify to him that they did have signed authorizations.

(Testimony of T. E. McShane.)

Trial Examiner Myers: I think you had better reframe your question, Mr. Callister.

Mr. Callister: All right.

By Mr. Callister:

Q. Did you have signed authorizations [113] at that time?

A. We had the membership.

Q. Mr. McShane, please answer my question. I think it is plain. Did you have signed authorizations at that time in May when you had this conversation with Mr. Wells?

A. We did not have an authorization as you see them there, no.

Trial Examiner Myers: You are referring to Board's Exhibit 2 when you point there?

The Witness: We did not have authorizations such as these at that time.

Mr. Royster: Let the record show the witness is holding in his hand Board's Exhibit 2(a) through (k).

By Mr. Callister:

Q. What did you have at that time, Mr. McShane, that advised you that you represented the majority?—

A. We had membership, and in signing an application into the Machinists Union the same rights of representation is stated on the heading of the application as you see on this authorization when they sign an application for membership they sign an authorization also. Part of it is an authorization.

(Testimony of T. E. McShane.)

Q. You had those with you at that time?

A. Those were in the records here.

Q. Records where?

A. I didn't understand.

Q. Where were these records? [114]

A. These records were in the Union office here at Reno.

Q. I see. In other words, there are other additional records showing authorization other than what is set forth, as I understand it, in Board's Exhibit 2, is that right?

Trial Examiner Myers: Maybe I could explain what the witness means. Some of the application blanks, application blanks of some Unions, contain a designation as well as an application for membership.

Mr. Callister: I understand.

Trial Examiner Myers: Is that what you mean?

The Witness: That is right.

Trial Examiner Myers: Where you designate the Union as your bargaining agent?

The Witness: When you sign that application you are not only making application but designating them as your bargaining agent.

By Mr. Callister:

Q. You had these on May 16, 1944?

A. We had a majority.

Q. Would you have any objections to letting us see those, Mr. McShane?

A. I do not have them.

Q. Could you obtain them?

(Testimony of T. E. McShane.)

A. I will ask the Board's attorney if I should do that.

Mr. Royster: Well, certainly you should do that, if they are available, if you know where you can obtain them. [115]

By Mr. Callister:

Q. Will you get those for me, Mr. McShane?

A. Do you want them right now?

Q. When it is convenient. This hearing will be on tomorrow. Let me see them, will you?

I refer you to Board's Exhibit 5 and I quote from it. The letter is dated August 8, 1944. You state there:

"We will submit proof of this representation at the first meeting with you."

You stated that, did you not?

A. That is correct.

Q. Well, now, Mr. McShane, as I understood you a few minutes ago, on May 16, 1944, which would be about four months prior to August 8th, you stated that Mr. Joe Wells and you had entered into negotiations and had agreed upon everything except wages and mechanic Diesel job classifications, is that right? A. That is correct.

Q. But notwithstanding he had agreed to everything you were going to submit proof of representation after August 8th, is that right?

A. That is correct.

Q. Now, Mr. McShane, you knew, did you not, in the month of May of 1944, as well as you know now, that if an employer had agreed to certain

(Testimony of T. E. McShane.)

provisions and there is dispute as to [116] others that they can be certified to the War Labor Board and the employers compelled to sign it and enter into it, isn't that right?

Mr. Royster: I object to that as calling for a conclusion.

Trial Examiner Myers: I will sustain the objection.

The Witness: I wish you would let me answer that.

By Mr. Callister:

Q. Is it not true, Mr. McShane, that continually during all these negotiations as you term them, and we will term them meetings, that a question had always arisen and was discussed at each one of these meetings the fact of representation, was it not?

A. The only time that, the first time that Joe Wells raised the question of representation and objected to negotiation on the ground of them was on December 22nd.

Q. Well, then, why, Mr. McShane, did you tell him on August 8th you would submit proof of representation?

A. Because we had it and we merely stated that so that there wouldn't be any reason for him to raise the question of jurisdiction because I had been informed in a round-about way that the Wells brothers who were here were going to raise the point of non-representation by the Union. That is the reason we secured these cards.

Q. Now, as I understand it, Mr. McShane, you

(Testimony of T. E. McShane.)

secured applications with this authorization on May 16th and then subsequently [117] secured these authorizations of Board's Exhibit 2?

A. You are asking me a question that doesn't exist. I did not say that we got authorizations or anything on May 16th.

Q. I did not say that, Mr. McShane, I am sorry. I said in addition to getting applications on May 16th, you subsequently got authorizations as was shown by Board's Exhibit 2, is that right?

Trial Examiner Myers: Do you know what the word "subsequent" means?

The Witness: I know what the word "subsequent" means.

Yes, but his question I don't know how to answer it. I don't know what he is trying to find out. His question is not clear to me.

Trial Examiner Myers: Will you reframe it?

Mr. Callister: I will be glad to reframe it.

By Mr. Callister:

Q. Mr. McShane, can you tell me why, if you had a majority of the employees on May 16th by virtue of some sort of a document, why you went to the trouble of getting additional authorizations which is shown by Board's Exhibit 2?

A. I will tell you. The reason that we found it necessary to do that, in the interim of time between May 16th and the time we got those, we had found out that the Wells brothers, we were having quite a bit of trouble getting them to live up to the terms of the agreement we already signed with them. [118]

(Testimony of T. E. McShane.)

Q. What agreement is that?

A. The one covering the Wells Cargo and they acted in a manner that we decided that we had better get the information which would be required by the National Labor Relations Board in the event that Wells brothers started backing up, which they had shown indications of doing by their actions of the way they were conducting the job on a signed agreement contrary to the terms of the agreement.

Trial Examiner Myers: We will take a short recess.

(Short recess).

By Mr. Callister:

Q. Mr. McShane, when you had this meeting in Reno during the month of December, you had Mr. Curtin with you, you say?

A. That is correct.

Q. Did you explain to Mr. Curtin at that time that you had agreed on everything except wages and the job classifications of body builders?

Mr. Royster: Objection to on materiality.

Trial Examiner Myers: Overruled.

By Mr. Callister:

Q. Did you do that?

A. Did I explain to Mr. Curtin?

Q. Yes.

A. I think that from the conversation between Mr. Wells and I that he could draw those conclusions.

(Testimony of T. E. McShane.)

Q. You never told him that? [119]

A. No, I told him that we had tentatively agreed on some of the provisions of the agreement.

Q. Did he at that time write them down, or do anything about it?

A. I do not know. I think he kept a record of the meeting. I do not know.

Q. Now, did Mr. Curtain, as Commissioner of the Conciliation of Labor, when you told him that you had agreed upon certain provisions, do nothing at all about it, you say?

A. I think my statement is in the testimony a while ago.

Q. Just forget what you said before.

A. That Mr. Curtain had suggested that Wells go ahead and negotiate.

Q. You do not get my point apparently, Mr. McShane.

What I want to know is, after you stated something was said in this meeting showing that you had got together on certain provisions, as you claim, did Mr. Curtain of the Conciliation Division, do anything about it such as to say "Well, now, let's sit down and set forth those things we have agreed on and set forth those things in disagreement." Did he do that?

A. No.

Q. Just tell me what Mr. Curtain did at this meeting in December, 1944?

Mr. Royster: I object to what he did as immaterial to [120] the issues in this case.

(Testimony of T. E. McShane.)

Trial Examiner Myers: Overruled.

A. Mr. Curtin appeared there, and it was very evident to me, whether it was to Mr. Curtin or not,——

By Mr. Callister:

Q. Mr. McShane,——

Trial Examiner Myers: Let him answer it his own way. Go ahead, Mr. Witness.

A. (Continuing) It was evident to me which I had known for sometime——

Trial Examiner Myers: Tell us what he said and did, Mr. McShane. Forget what was evident.

The Witness: What Curtin said and did?

Mr. Wells and I done most of the talking. Curtin, when Mr. Wells finally decided that we did represent the people and that he would continue negotiating after we first went in, why he strenuously objected to a Union shop or any overtime provisions and the wage scale.

By Mr. Callister:

Q. Mr. McShane, please tell us——

Trial Examiner Myers: Tell us what Curtin did. Did he sit down or stand up or say hello, or what. Just Curtin, nobody else.

The Witness: All right. Curtin tried to get Wells to negotiate and Wells decided that he would, and then after he went out and talked to the employees, he decided not to.

Trial Examiner Myers: Never mind what Wells did. What did Mr. Curtin do? [121]

The Witness: Mr. Curtin told Wells that their

(Testimony of T. E. McShane.)

actions were unusual and that he didn't understand them, and I believe that he told them that if they demanded an election and the Union would agree to it that that is what it would be.

Q. (By Mr. Callister) Did Mr. Curtin say anything else at that meeting in respect to representation?

A. I was instructed once to not say anything about what Mr. Curtin said, only in the presence of Wells.

Trial Examiner Myers: Nobody instructed that.

Go ahead. Did Mr. Curtin say anything at this meeting about this question of representation? Is that the question?

Mr. Callister: That is correct.

The Witness: Mr. Curtin asked me when Wells demanded an election held what was our position in regard to that matter and I told him that we were agreeable to an election.

Q. (By Mr. Callister) You said you were agreeable?

A. That is right, I told him we were agreeable to an election at that time.

Q. Mr. Wells said that he was agreeable to an election?

A. Mr. Wells is the man that demanded the election be held.

Q. You said you were agreeable to it?

A. That's right.

Q. What happened with respect to the election, why wasn't one held? [122]

(Testimony of T. E. McShane.)

Mr. Royster: If you know.

A. You are asking me if I know why an election wasn't held?

Q. (By Mr. Callister) Yes.

A. I do not know.

Q. Did you give to the Conciliator, Mr. Curtin, a copy of the proposal which you submitted to Mr. Wells, as you claim?

Trial Examiner Myers: He means the proposed contract.

A. I did not give to Mr. Curtin the proposal of the agreement.

Q. (By Mr. Callister) Didn't Mr. Curtin as Conciliator ask you for those terms, conditions you claimed you had agreed upon?

Mr. Royster: I renew my objection to this line of testimony.

Trial Examiner Myers: You mean this meeting?

Mr. Callister: Yes, or any time.

Trial Examiner Myers: Confine it to the meeting?

Mr. Callister: We all know the procedure of the Conciliation Service. I think it goes to the credibility of the witness.

Trial Examiner Myers: Overruled. What transpired at the meeting is all right, but what he took up or did not take up with the Conciliator, I am not interested in.

Do you want what transpired between this witness and the conciliator at the meeting?

(Testimony of T. E. McShane.)

Mr. Callister: I assume he told us all. [123]

Q. (By Mr. Callister) Isn't that correct, you stated all that took place between you and the Conciliator at the meeting?

A. There was possibly some other talk that I don't recall word for word.

Mr. Callister: That is all.

Trial Examiner Myers: Any questions, Mr. Apperson?

Mr. Apperson: No.

Trial Examiner Myers: And redirect?

Mr. Royster: No further questions.

Trial Examiner Myers: You are excused, Mr. McShane. Thank you very much.

(Witnessed excused.)

Trial Examiner Myers: Will you call your next witness, Mr. Royster?

Mr. Royster: Mr. Examiner, at this point I would like to receive the permission of the Examiner to substitute for Board's Exhibit 2(a) through (k) copies.

Mr. Callister: We have no objection.

Trial Examiner Myers: There being no objection you may substitute copies in lieu of the original.

Mr. Royster: Also, Mr. Examiner, during our recess I telephoned Wells, Inc. shop and asked that C. H. McBride come up here to testify. I talked to Mr. McBride and he said he would manage to get up here in about half an hour. I

intend to put Mr. Benton on now and would like to break into [124] his testimony when Mr. McBride arrives.

Trial Examiner Myers: Very well. Is Mr. McBride working?

Mr. Royster: He is working.

Trial Examiner Myers: Very well.

Mr. Benton, take the stand, please.

JACK BENTON

a witness recalled by and on behalf of the National Labor Relations Board, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Royster) Are you the same Jack Benton who previously has testified in this case?

A. I am.

Q. Mr. Benton, what was your job classification when first you were employed by Wells, Inc.?

A. Well, I was mechanic, but I was hired by Mr. Joe Wells in Las Vegas to start out the night shift, and I was going to be the night mechanic.

Q. Where? A. Reno.

Q. What was your salary?

A. Well, I worked days.

Q. When you started?

A. \$250 I think.

Q. And you testified that you were a foreman. When were you [125] promoted to foreman?

A. I think it was April 15, 1943—'42 I guess.

Q. I believe that you testified that you entered

(Testimony of Jack Benton.)

upon your employment there in August, 1942?

A. August 17, 1942.

Q. And you were promoted foreman when?

A. That following April.

Q. April '43? A. Yes.

Q. By whom were you promoted?

A. By Mr. O. A. Richer, shop superintendent. At that time he was shop foreman, so I guess he was shop foreman at the time he promoted me, because he got a promotion.

Q. What change, if any, was there in your duties after your promotion?

A. To foreman?

Q. Yes.

A. Full responsibility of trucks and repair work in the shop at Reno.

Q. Did you direct the efforts of the other employees in the shop?

A. Every man that worked in the shop.

Q. Now, in April, 1943, when you were first elevated to the foremanship, did Wells, Inc. have body workers, body builders? [126]

A. No.

Q. They did subsequently establish a body shop, did they?

A. At a later date, I don't remember.

Q. At any time did you supervise the work of the employees in the body shop?

A. For temporary period, yes, sir.

Q. After you became foreman did you receive overtime pay? A. No, sir.

(Testimony of Jack Benton.)

Q. Did you work any overtime?

A. About nine months as a foreman I think I worked 560 some hours overtime.

Q. Did you do any work as a mechanic during the time you were foreman?

A. All the time. I had the best set of tools they hand and worked with them always, always had my tools open.

Mr. Callister: You are not claiming he was part of the unit, are you?

Mr. Royster: No, I just wanted to get a description of his duties.

Mr. Callister: You will stipulate he was not part of the unit?

Mr. Royster: That is right.

Mr. Callister: Because of the fact he was a foreman with the right to hire and fire?

Mr. Royster: He had authority to hire and fire, no [127] question about that.

Q. (By Mr. Royster) What salary increases did you receive during the entire period of your employment by Wells?

A. Started at \$325.

Q. The entire period of your employment from the time you went to work in 1942, you testified your salary was \$250 a month.

A. We were taken off a salary and put on by the hour. Everybody was, and then we worked, I went on nights at \$1.37½ an hour because it was night man.

(Testimony of Jack Benton.)

Q. That was before you were foreman?

A. Yes, sir.

Q. When you were made foreman did you receive a salary increase? A. Yes, sir.

Q. To what amount? A. \$325.

Q. A month?

Trial Examiner Myers: \$325 a month you received as salary?

The Witness: Yes, sir.

Q. (By Mr. Royster) Did your salary remain \$325 a month?

A. For a period of six to eight months. Then I got a raise of \$25.

Q. Making your salary \$350? [128]

A. \$350.

Q. When did you say you were made foreman?

A. I was made foreman the 16th day of April.

Q. What year? A. 1943.

Q. After your salary was increased to \$350 a month, did you receive a further increase?

A. Yes.

Q. When did you receive it?

A. January 1st, 1945.

Q. How much increase? A. \$25.

Q. A month? A. Yes, sir.

Trial Examiner Myers: That brought your salary up to \$375 a month?

The Witness: Yes, sir.

Trial Examiner Myers: That was the first of January this year?

The Witness: Yes, sir.

Q. (By Mr. Royster) Are you a member of the

(Testimony of Jack Benton.)

International Association of Machinists?

A. I am.

Q. When did you join?

A. Initiated in October, 1942, I guess. [129]

Q. Where were you employed at the time you joined the Union? A. Wells, Inc.

Q. Was that prior to your elevation to the foremanship, that was before you were made foreman? A. That was nights.

Trial Examiner Myers: You say sometime in October, 1942?

The Witness: I was initiated in October, 1942.

Q. (By Mr. Royster) Do you hold any office in the Union? A. I do, yes, sir.

Q. What office is it?

A. Trustee and steward of the shop.

Q. Where?

A. Steward of the shop when I was at Wells.

Q. What were your duties as shop steward?

A. Well, shop steward, do you want the duties of a shop steward?

Q. What you did as shop steward?

A. I couldn't do anything; we had no working agreement with Wells, Inc. Shop steward is to take up——

Trial Examiner Myers: We know what a shop steward is, but we want to know what you did.

The Witness: Nothing.

Q. (By Mr. Royster) Did you talk to employees at the Wells shop about the Union? [130]

A. Well, we all talked a little bit of Union, the

(Testimony of Jack Benton.)

whole bunch, all the mechanics at that time belonged to the Union. The only time the Union was discussed, and our wages were——

Mr. Callister: (Interposing) I move to strike “all the employees at that time belonged” as indefinite, immaterial, incompetent and irrelevant, and not the best evidence.

Trial Examiner Myers: Strike out the whole answer. Read the question.

(Question read by the Reporter.)

A. (Continuing) No more than anybody else.

Trial Examiner Myers: Did you, yes or no.

The Witness: No.

Trial Examiner Myers: You did not say a word about the Union to anybody?

The Witness: We all belonged to it.

Trial Examiner Myers: Did you ever talk about the Union to any of the employees?

The Witness: Yes.

By Mr. Royster:

Q. What did you say to them?

A. Say to who?

Q. To the employees in the shop when you were talking about the Union?

A. Well, I didn't have to say much of anything.

Q. But what did you say to them?

A. We were all in favor of our Union for a written agreement [131] and more money, my men were dissatisfied and wanted to quit. They worked

(Testimony of Jack Benton.)

overtime, long hours and I was getting always talk from the men why couldn't they do this, why couldn't they do that, we got a Union.

Q. Did you tell any of the employees in the shop they had to join the Union to hold their jobs?

A. No, sir.

Q. Did you promise them any preferred treatment if they joined the Union? A. No.

Q. Did you secure the signature of any employee in Wells shop to a Union authorization?

A. I don't think so, no, sir.

Trial Examiner Myers: What is it, no, sir?

The Witness: No, sir.

By Mr. Royster:

Q. Did Bob Wells ever mention the Union in your presence—May I withdraw this witness for a moment? Mr. McBride is here now.

Trial Examiner Myers: Any objection?

Mr. Callister: No. As a matter of fact, I think it would be all right if he wants to finish with this gentleman. We will be glad to excuse Mr. McBride at the shop if he wants him in chronological order.

Mr. Royster: I don't want this man to lose any pay.

Mr. Callister: We will assure you he won't lose any pay. [132]

Mr. Royster: Do you want to wait here a while?

Mr. McBride: I'd rather get back to work.

Mr. Royster: Very well.

(Witness temporarily withdrawn.)

C. H. McBRIDE

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: C. H. McBride.

Trial Examiner Myers: Please spell your last name for the record.

The Witness: Mc B-r-i-d-e.

Trial Examiner Myers: Where do you live?

The Witness: 728 Quincy.

Trial Examiner Myers: Reno?

The Witness: Reno.

Trial Examiner Myers: You may be seated and you may proceed, Mr. Royster.

By Mr. Royster:

Q. What is your employment, Mr. McBride?

A. Mechanic for Wells Company.

Q. Here in Reno?

A. Here in Reno, yes.

Q. How long have you been employed by Wells? [133]

A. Be a year next month.

Q. What was your job classification on June 3, 1944?

A. Didn't work for Wells then; worked for Wagner Tank:

Q. Just a moment, June, 1944——

Trial Examiner Myers: When did you start with Wells?

(Testimony of C. H. McBride.)

The Witness: I filled in my blank the seventh day of September, 1944, for Wells, and went to work on the 8th.

Q. (By Mr. Royster) Has your job classification changed since you went to work for Wells?

A. Not that I know of.

Q. It has been a mechanic right along?

A. Yes.

Q. Have you ever designated the Union, that is, the International Association of Machinists or Local 801 of that organization to represent you in matters of collective bargaining?

A. Well, one time right after I went to work for them there was somebody, I don't know who it was now, I can't remember, I was new on the job, came with a petition to be signed and I read the petition over and it was some mechanics union in Reno, I forget the number of it. Then I handed it back to Harold Wilson or Cassinella, my foreman. They signed it first and I signed under them, but I wouldn't sign until they did to make sure it was the right one.

About three days later Harold Wilson told me it was the [134] wrong one that we signed, it was some other Union we were supposed to sign. I don't know nothing about it, that is all I know, but I never did see or hear of the Union Harold Wilson said we were supposed to sign.

Q. Just a minute. I show you Board's Exhibit 2(g), and have you ever seen such a designation as that?

(Testimony of C. H. McBride.)

A. No, the one I signed we all signed on the same sheet.

Q. You did not sign a slip such as that?

A. No, I don't hardly think so. I only signed one sheet and it was all on the same paper.

Q. When did you say you signed this paper?

A. I don't know the date, all three signed the same date.

Q. Correct me if I misinterpret your testimony, did you say shortly after you went to work for Wells?

A. Yes, shortly afterwards, but I remember it was all on one paper.

Q. What did you think you were signing when you signed that?

A. I knew what I was signing.

Q. What was it?

A. It was a Union agreement with this Union to have a closed shop. It was no contract, nothing like that, but I didn't know what Union they belonged to, the shop's mechanics.

Q. Do you know now what Union you were designating by signing that paper?

A. I don't remember now, no. I read it, I read the number of [135] the Union and everything on it, but nobody said anything to me, see, I was new on the job. I figured they had it all figured out before I got there, but I guess they were all mixed up.

Mr. Royster: No further questions.

Trial Examiner Myers: Any questions, Mr. Callister?

Cross-Examination

Q. (By Mr. Callister) You say it was a petition given to you to be signed?

A. Yes, sir.

Q. Do you know who handed it to you, is he present here?

A. I couldn't tell you at all.

Mr. Callister: I will ask the Board's attorney if they have any objection to that petition to letting the respondent's attorney see it.

Mr. Royster: I have no objection to it.

Q. (By Mr. Callister) I will ask you this: Did any employee at Wells Transportation Company go with the Union men around to have this signed, or was the Union man alone?

A. I couldn't answer that either.

Q. You do not remember?

A. No, I don't remember a thing about that.

Q. You say this was the month of December, 1944, this took place?

A. September I went to work and it was afterwards, not [136] very long afterwards that the petition came around and I went to work in September. I am pretty sure it was September the 8th.

Q. That you went to work?

A. For Wells.

Q. This petition was sometime later?

A. Sometime later, yes.

Mr. Callister: Does Board's attorney have any objection to having this made an exhibit? I know this belongs to the Union. I would like to request, I think the Board should have that as an exhibit.

(Testimony of C. H. McBride.)

Mr. Royster: I am perfectly willing to put it in on your request.

Mr. Callister: For the purpose of course, this is the document he signed?

Mr. Royster: Yes, I talked to Mr. McBride over the telephone, and frankly I thought he signed one of the small slips and I thought I was going to have him testify to that. But he is on the petition.

Mr. Callister: Let me hold this back and we will make a decision on it later.

Mr. Royster: I think I will ask him if he can recognize his signature.

Redirect Examination

Q. (By Mr. Royster) Would you recognize your signature on this [137] petition, Mr. McBride, if it were shown to you? A. Yes.

Q. Will you take a look at this? Do you see your signature on that?

A. It is right down here.

Q. Can you tell us now what Union, if any, by your signature you designated to represent you in matters of collective bargaining?

A. Only what is on the head of the letter here.

Q. Was that on the head of the letter when your signature was appended on there?

A. Well, it says here Local 801, A. F. of L.

Q. Was that on there when you put your signature on the document?

A. Must have been, it's all on the same paper.

Q. Do you recall that it said that you would

(Testimony of C. H. McBride.)

thereby authorize the International Association of Machinists, Local 801, to act as your bargaining agent?

A. I couldn't say the number was right.

Q. Was it International Association of Machinists?

A. It was Machinists I know that.

Recross Examination

Q. (By Mr. Callister) Mr. McBride, as I understood your testimony, after you signed this petition Mr. Wilson, a fellow employee, advised you you signed the wrong petition? [138]

A. That is told us two or three days later, we signed the wrong petition. He said it was another Union he was thinking about, but I thought he had it all figured out.

Q. In other words, you signed this apparently on Mr. Wilson's representation?

A. I made them sign it first.

Q. You signed it because Mr. Casinella and Mr. Wilson signed it?

A. I knew I would have to be in the same Union as the rest of them or I wouldn't work.

Q. After you did that, Mr. Wilson advised you they were wrong and made a mistake, is that right?

A. That is right.

Redirect Examination

Q. (By Mr. Royster) Did anyone at Wells, Inc. tell you that you had to join in any particular Union in order to work there?

A. No, that was never said to me.

Q. Was there any inducement made to you to sign this petition? A. No.

Q. Any promises?

A. No, just asked me if I would.

Recross Examination

Q. (By Mr. Callister) Who asked you, this Union man or any employee? [139]

A. It was a Union man, whoever brought it around, the one who asked me. I can't remember.

Trial Examiner Myers: You do not know whether he was an employee or not?

The Witness: I would have known at the time, but I can't remember who brought that in.

Trial Examiner Myers: Any other questions?

You are excused, Mr. McBride. Thank you very much.

(Witness excused.)

Trial Examiner Myers: Mr. Benton, will you take the stand, please?

JACK BENTON

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Royster: I believe, Mr. Examiner, that I had propounded a question to Mr. Benton and Mr. McBride came in. I would like to have that question stricken.

Trial Examiner Myers: All right.

By Mr. Royster:

Q. Did Bob Wells ever mention Union in your presence?

A. We had quite a discussion of Union one day.

Mr. Callister: Just one moment, I object to it on the ground——

Trial Examiner Myers: Say "Yes" or "No," and let us go ahead. [140]

By Mr. Royster:

Q. When did the mention of the Union take place?

Mr. Callister: I want to make my objection on the ground that it is immaterial, incompetent, irrelevant, confidential between a supervisory employee and the officer of the company.

Trial Examiner Myers: Overruled.

Naturally he couldn't be 8(1), cannot be a violation of 8(1).

By Mr. Royster:

Q. When did this conversation take place?

A. I would say there was no date to remember, it was just a conversation at the store one day.

Trial Examiner Myers: What year was it in?

The Witness: '44.

By Mr. Royster:

Q. This past year?

A. Yes, sir.

Q. About what month in the year?

A. I would say somewhere along September or October.

Q. September or October, 1944?

(Testimony of Jack Benton.)

A. Yes.

Q. Where did this conversation take place?

A. In the shop.

Q. In the Wells shop at Reno? A. Yes.

Q. Who was present besides you and Bob Wells? [141]

A. I don't know, the bunch eating dinner, Blackie Ellis.

Q. By Blackie Ellis do you mean Oran Ellis?

A. Oran Ellis.

Q. Who else?

A. The day crew, Melvin Jakomiet.

Q. What time of day was this?

A. Noon, it was lunch.

Q. Were you in a group? A. Yes.

Q. Was the conversation or the remarks which Bob Wells made at that time audible to everyone in the group?

A. I suppose it was, yes.

Q. You were there and you heard him speak, you know how the men were situated.

A. Yes.

Q. Would you say that everyone could have heard what he said?

A. Yes, if they wanted to they could have.

Q. What did Bob Wells say?

A. Well, we were talking of Unions and he said Unions were lousy, Unions would keep a good man down and promote a sorry man, and we argued quite a bit there about it, just it wasn't no heated argument, it was one of our friendly arguments.

(Testimony of Jack Benton.)

We got into them several times about different things, and he said that where a good man would be held down by a Union [142] they would uphold a sorry man. Any time a company that was working men couldn't fire a man without being told by the Union what to do, why it was a hell of a place to work. That is just about the subject of the Union that went on.

Q. Did you make any remarks?

A. Well, sure, I stuck up for the Union.

Q. What did you say?

A. Well, I told him that I thought a Union was a good thing if it was lived up to. There were good things in it and bad things the same as any other organization.

Q. Were you at that time a member of the International Association of Machinists?

A. Yes, sir.

Q. Did anyone in authority over you at Wells, Inc. ever instruct you in any respect concerning conversations about the Union? A. No.

Q. Did you wear a Union button?

A. Yes, sir, I wore one I would say about 65 per cent of the time until we forgot to take them off.

Trial Examiner Myers: Never mind what we did.

The Witness: I did.

Q. (By Mr. Royster) Did anyone ever remark to you——

(Testimony of Jack Benton.)

Trial Examiner Myers: Where did you wear the button?

The Witness: On my coveralls. [143]

Trial Examiner Myers: While you were at work?

The Witness: Yes, sir.

Q. (By Mr. Royster) Was it covered up by anything? A. No.

Q. Did anyone ever remark to you about your Union button?

A. Bob Wells did. He said one time, he said——

Q. (Interposing) Your answer is, yes, someone did remark? A. Yes.

Q. Who made that remark?

A. Bob Wells.

Q. When did he make it?

A. In the office of Wells, Inc.

Q. When?

A. I think it was along in December.

Q. What year? A. 1944.

Q. Was anyone present within hearing?

A. No, I would say they were, but probably they never paid no attention.

Q. What did he say?

A. He asked me what that yellow thing was on my sweater. He said, "Did a bird fly over you?" I said, "No, it's a Union button, the men wear them."

Q. Did he make any further remark than that?

A. No. [144]

(Testimony of Jack Benton.)

Q. Do you know George McKay?

A. Sir?

Q. Do you know George McKay?

A. Yes, sir.

Q. Do you know if he visited Wells shop about the first of December, 1944? A. I do.

Q. What time of day did he come?

A. We were just getting ready for noon, twelve o'clock.

Q. Your lunch hour is from——

A. (Interposing) Twelve to one.

Q. Were the men working?

A. Just stopped working.

Q. Did McKay have a conversation with anyone in your hearing?

A. He had one with Bob Wells.

Q. You heard that conversation?

A. Part of it.

Q. What did you hear?

A. Told him not to come in there and bother his men, he didn't want them bothered. McKay said he was in there to collect dues and he said, "Well, I don't want you in this shop. You get out and stay out."

Q. Did you join in that conversation?

A. I did.

Q. What did you say? [145]

A. I told Bob, I said, "We are not working. He come in here to collect dues from the boys." I said, "I don't see why he can't come in here any time he wants to to collect dues. The Teamster boss

(Testimony of Jack Benton.)

comes in any time he wants to and talks for a long period of time."

Q. Well, now, that is what you told Bob Wells. Did you, during the period of your employment there observe a representative of any other labor organization come in the shop and talk to the men? A. Oh, yes.

Q. Who?

A. The Teamster, Mr. Anderson, and the other man with him, I don't know who he is.

Q. How frequent were their visits would you say?

A. They have been in there when I was foreman and talked to Reisbeck 30 or 45 minutes at a time, sit over on the bench and talk.

Q. Do you know whether or not they were ever asked to keep out of the premises by Mr. Wells?

A. I do not.

Trial Examiner Myers: Do you know whether or not Mr. Bob Wells ever saw Mr. Anderson there?

The Witness: I think so. They used to come into the office into the shop.

Trial Examiner Myers: Was Mr. Bob Wells always in the [146] office?

The Witness: Always around there pretty close. There was never no objections to him in there.

By Mr. Royster:

Q. Do you know H. B. Divine?

A. Yes, sir.

Q. Who is he?

(Testimony of Jack Benton.)

A. Shop Superintendent I guess of Wells, Inc.

Q. Here at Reno? A. Yes, sir.

Q. Do you know when he came to work for Wells at Reno?

A. Oh, came up here sometime in December, around in about the first of December, I think, I wouldn't be sure.

Q. Of what year? A. '44.

Q. Was he in a position of authority over you?

A. Yes, sir, my superior.

Q. Did you have a conversation with Joe Wells and H. B. Divine shortly after Mr. Divine came up here to work?

A. I was called in the office, I don't know by who, one of the boys, I think, and there was Mr. Howard Wells, Mr. Divine, Mr. Frank Wells, the father, and Joe present, and I was called in and they told me at the time that there was no need of going out and telling each man in the shop that Mr. Divine was going to take Mr. Richer's place, and that I being the foreman he called me in and told me that I was to tell my [147] own men that there would be no changes made, I would continue shop foreman, Mr. Divine would be in place of Mr. Richer, and to go on and do their work as they had done before, and everything was all right.

Q. Was anything said to Mr. Divine in your presence about you?

A. I think Howard Wells, Mr. Howard Wells here, we had quite a conversation among ourselves about different things, but he told Mr. Divine that

(Testimony of Jack Benton.)

—he says, “Well, Bob and Jack have had words over trucks. They had come in here and maybe one would service and Bob needed it for a trip and he would take it and Jack would find out about it and bellyache about it and Jack would do Bob the same way,” and he said, “I will say that Jack has co-operated with Bob 100 per cent,” and that’s the words Mr. Howard Wells spoke to that group.

Q. Did you have a conversation with Mr. Divine about your status as foreman?

A. Yes, sir.

Q. About when did that conversation take place?

A. Oh, it was around maybe the latter part of December or the first of January.

Q. That is, December 1944 and January 1945?

A. Yes, sir.

Q. Where did the conversation take place? [148]

A. In the shop.

Q. What was said?

A. Well, I told him (Divine) that I would like to talk to him about the foreman job. I said, “There’s mechanics getting \$350 a month and I am getting \$375 a month, and I am on call 24 hours a day. I take the dirtiest part of the road work on the mountain, I never put the dirty one off and take the good ones.” And I said, “I wonder if you get me a little more money. There is not enough difference between the mechanics and myself. I come down here and get held up and work overtime and they work 8 hours a day, six days a week, for \$350, and I work 6 days a week and overtime

(Testimony of Jack Benton.)

and I just get \$25 more than they do and I wondered if I could get some more money." If that wasn't satisfactory, I wondered if he could get another foreman and give me a job back as a mechanic. In fact, we talked about just indirectly of me going back to night shift. We were having quite a little bit of trouble and fellows, we didn't have the qualified men, and he said, "Well, I will see what I can do." And he said, "I think everything can be arranged and don't worry." And that is the last that I heard of it until January 31st.

Q. What did you hear January 31st?

A. January 31st I just got through calling up a grease man, he greased a truck and left about half the fittings ungreased and I was correcting this grease man to go back and grease those trucks, he had plenty of time, we weren't [149] rushing him, I wanted them greased. Mr. Divine called me over to one side and I walked over, and he said to me, he said, "Well, Jack, I guess you will be relieved of your shop foreman duties." And I said, "Why, that is just fine." I said, "It wasn't worth it anyway. The mechanic job is the best." And I said, "What shift do you want me to work?" And he said, "Well, I don't think it would work out, Jack, if I put you on another shift as a mechanic. I have worked in shops and I have run men and I have seen it tried and it hasn't worked." And he said, "I don't think it would work out."

(Testimony of Jack Benton.)

I says, "Well, I worked for Mr. Richer and I think I can work for you." And he said, "Well, I don't think it would." And I said, "In other words, you mean that I am fired?" And he said, "If you look at it that way, yes." And I said, "Thank you." That is all there was.

Q. Since January 31, 1945, have you worked for Wells? A. No.

Trial Examiner Myers: Did you leave the plant right after?

The Witness: It was five minutes to six when I got notified of my discharge.

Trial Examiner Myers: You cleaned up and left?

The Witness: I came back the next day after my tools and I didn't get my discharge slip, I don't think, and my [150] checks until the 6th or 7th of February, and when I got my check I found that I was practically fired on the 29th of January, my birthday, and it was stamped on the check and I had been off on my birthday to a dinner party and asked Mr. Divine if I could have the day off to go to Fernley and have dinner with some people because my wife's birthday was the 5th and mine the 29th, and he said, "Yes." I went over there for my birthday and when I got back I suppose I'd have got fired the 30th, but Mr. Divine wasn't on the job the 30th. The 31st he was on the job. He didn't tell me until five minutes of quitting time, no notice at all.

Q. (By Mr. Royster) Now, Mr. Benton, as

(Testimony of Jack Benton.)

shop steward for the Union at Wells in Reno, was it your responsibility to know which of the employees were and which were not members of the Union? A. Yes, sir.

Q. Now, I show you Board's Exhibit 3 and glancing at the list of Reno shop employees on the payroll, period ending May 15, 1944, will you tell me which of them, if any were members of the Union at that time?

Mr. Callister: We object on the grounds that it is immaterial, incompetent and irrelevant.

Trial Examiner Myers: I will sustain the objection.

The Witness: O. A. Richer—

Mr. Royster: The objection was sustained. [151]

By Mr. Royster:

Q. Will you tell us which of the employees, if any, on that payroll had confided to you as shop steward their desire to have the Union represent them?

Mr. Callister: Just a minute, same objection.

Trial Examiner Myers: I will sustain the objection.

Mr. Royster: No further questions.

Cross Examination

By Mr. Callister:

Q. Mr. Benton, I assume that in your position as shop foreman, with the right to hire and fire, you directed the activities and told the men what

(Testimony of Jack Benton.)

type of jobs they were to be on and shifts they were to work? A. Yes, sir.

Q. And the mechanics looked to you for complete supervision and direction? A. Yes, sir.

Q. Now, Mr. Benton, did you ever have conversations with the mechanics in regard to unionization in the place, I will say sometime during the year 1944?

A. Well, we all wanted a Union in there.

Q. Well, Mr. Benton, did you discuss it with any employees?

A. No, we all wanted it.

Q. Well, Mr. Benton, you had conversations, did you not, with the various employees in telling them what benefits the Unions were?

A. When I would hire a man they would always ask me, "How [152] much wages do you pay? Do you pay overtime?" I would say, "No sir." "What is your wages for heavy-duty man?" "\$1.25."

I couldn't hire a heavy-duty Diesel man.

Q. You have not answered my question.

A. I am answering it if you give me time.

Q. Let me forget this other thing. Did you have any conversation with any employees in the Wells, Inc., during the year 1944 with respect to the Union?

A. Not in the shop, we didn't talk it that way.

Trial Examiner Myers: Did you talk about it? We don't care whether you went upon the roof or swimming in the ocean. Did you talk to anybody about it?

(Testimony of Jack Benton.)

The Witness: Well, I would say——

Trial Examiner Myers: You said “Yes” before. Let us go ahead.

The Witness: Yes.

By Mr. Callister:

Q. What did you say to them? Think back, take your time, tell us what your conversation was.

A. We were all talking to—the men belonged to the Union. We had a working agreement there, we would probably have a bettering of it.

Q. I didn’t get that.

Trial Examiner Myers: The men that belonged to the Union?

The Witness: Men belonged there, we would have a better [153] one, they was always crabbing about time.

By Mr. Callister:

Q. Mr. Benton, can you tell us any conversation you had with any employee there in which you said anything about the Union to him? Do you understand my question? Did you talk to the employees and say anything for or against the Union?

A. No, I wouldn’t say we would converse it there.

Q. Did you ever say anything to any of the employees at Wells, Inc., I think you said you did. Tell us what you said.

A. Well, I can’t remember.

Q. Think back. You can remember what you said in substance and effect. You told them, did you not, the Union was a good thing?

(Testimony of Jack Benton.)

A. Well, we believed in it or wouldn't have joined it.

Q. You told these employees the Union was a good thing, they should join?

A. I never told them they should join, no sir.

Q. You told them it was a good thing, did you not?

A. I never told them they should join. We have a Union. If they wanted to join it, it was up to them, they were not forced.

Q. Did you tell them it was a good thing?

A. I suppose they all know.

Q. Did you tell them that? [154]

A. No, I wouldn't say I did.

Q. What did you tell them?

A. We had a Union. Most of them came in for the cure, if you know what I mean. They didn't join the Union, they didn't stay long enough. I didn't ask 90 per cent to join. They didn't have the money to join.

Q. The other 10 per cent you did ask to join?

A. Yes, and they joined. I didn't ask them to join, I told them we had a Union there if they wanted to join, and they joined.

Q. You figured that your duty as a steward or trustee was to get the men in the Union?

A. The job of the steward is take up trouble with the Union, between them and the agreement with the company.

Trial Examiner Myers: Did you ever take up any?

(Testimony of Jack Benton.)

The Witness: We didn't have anybody to take them up with. We didn't have anybody to go to.

Trial Examiner Myers: All right, will you stop. Let the man ask another question instead of rolling on over the same thing.

By Mr. Callister:

Q. I hand you, Mr. Benton, a letter dated December 18th, in which your signature purportedly appears. Is that your signature?

A. Yes, sir.

Q. Did you have anything to do with the preparation of that? [155]

A. No, sir.

Q. Did you help circulate it? A. No, sir.

Q. You had nothing to do with it?

A. Brought it around and I signed it.

Q. Who brought it around, do you remember?

A. No, I don't remember right offhand who did bring it around, or did I go up and sign it up to the—I signed it up to the Union Hall, I think, up to Mac's Garage.

Trial Examiner Myers: Will you answer the question and let us go ahead. The man asked you who brought it around. Do you remember?

The Witness: No, I really don't.

Mr. Royster: Could we identify that document for the record, so it will be a little less confusing? May I do so?

Trial Examiner Myers: Do you want it marked for identification?

Mr. Royster: No.

(Testimony of Jack Benton.)

Trial Examiner Myers: Then don't identify it at all.

Q. (By Mr. Callister) Mr. Benton, I assume that the employees there knew that you were a trustee of the Union did they not?

A. Yes, sir.

Q. They knew you were shop steward?

A. Yes, sir. [156]

Q. Now, Mr. Benton, in your conversation with Mr. Divine, you advised him you didn't want to be foreman any longer, is that correct?

A. In my conversation I would rather not have the job at \$25 difference in pay.

Q. You would rather be a mechanic?

A. I would rather be a mechanic because it was too much grief.

Trial Examiner Myers: Nobody asked you that. You are holding back this hearing about three hours. Will you just listen to the question and answer it directly. We can get along here.

Mr. Callister: That is all.

Trial Examiner Myers: Any questions, Mr. Apperson?

Mr. Apperson: No questions.

Trial Examiner Myers: Mr. Royster?

Mr. Royster: No further questions.

Trial Examiner Myers: You are excused, Mr. Benton.

(Witness excused.)

Trial Examiner Myers: Will you call your next witness, please, Mr. Royster?

Mr. Royster: May I have just a moment, Mr. Examiner?

Trial Examiner Myers: All right.

Off the record.

(Discussion off the record.) [157]

Trial Examiner Myers: On the record.

Mr. Royster: That is the Board's case, Mr. Examiner.

Trial Examiner Myers: The Board rests?

Mr. Royster: The Board rests.

Trial Examiner Myers: Are you ready to proceed, Mr. Callister?

Mr. Callister: May I have a five-minute recess?

Trial Examiner Myers: Very well, take a short recess.

(Short recess.)

Trial Examiner Myers: Are you ready to proceed with your case, Mr. Callister?

Mr. Callister: I am.

Trial Examiner Myers: Will you please call your first witness?

Mr. Callister: Mr. Divine, will you please come forward and be sworn?

H. B. DIVINE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: H. B. Divine.

(Testimony of H. B. Divine.)

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: D-i-v-i-n-e. [158]

Trial Examiner Myers: Where do you live, Mr. Divine?

The Witness: 333 Fodrin Way, Sparks, Nevada.

By Mr. Callister:

Q. By whom are you employed, Mr. Divine?

A. Well, Inc.

Q. When did you become employed by them?

A. Went to work for Wells, Inc?

Q. That is the one I want. A. In 1941.

Q. When was this last period?

A. After leaving Wells Cargo, Inc., I went to work for Wells, Inc., in December, 1944.

Q. In what capacity?

A. Superintendent of maintenance.

Q. Are you still in that capacity?

A. Yes, sir.

Q. Mr. Divine, calling your attention to some-time during the month of December, did you have a conversation with Mr. Jack Benton, who just testified here a few minutes ago?

A. Not December.

Q. Not in December, in January, pardon me.

A. In January.

Q. 1945? A. Yes, sir.

Q. Will you just tell us that conversation, if you will, [159] please, what you said and what Mr. Benton said?

(Testimony of H. B. Divine.)

A. Well, Mr. Benton came to me and told me that he was dissatisfied with the foreman job because there wasn't enough money in it for the grief there was, he would like to be relieved of it.

Q. Would like to be relieved?

A. I asked him to stay on for four or five days until I could replace him, which I did about within a week. I told him that I had a man to take his place that would take over the next day, I believe it was. He wanted to go to work in the shop as a mechanic.

Q. What did you say as to that?

A. I told him from my past experience that it had never worked out and I didn't want him as a mechanic.

Trial Examiner Myers: When you say "him" and "he"—

The Witness: Jack Benton.

By Mr. Callister:

Q. Did you have a conversation with Mr. Benton subsequent to the time his employment was terminated in January of '45?

A. Yes, Mr. Benton came after his check.

Q. About when was that?

A. Oh, the first part of January, about between the 7th and 10th.

Q. You mean February, don't you?

A. February, yes. [160]

Q. Where was that?

A. At Wells, Inc., shop.

(Testimony of H. B. Divine.)

Q. Was anyone present besides you and Mr. Benton?

A. Yes, I believe Mr. Darrell Webb.

Q. Who was he?

A. He was head bookkeeper.

Q. For Wells, Inc? A. Yes, sir.

Q. Just tell us the conversation you had with Mr. Benton at that time?

A. Mr. Benton, when he got his check, looked at it and said he wouldn't accept it, he was going to get paid for his vacation, overtime, and there was one other thing, I don't recall just what it was, and if he didn't get them, he was going to cause me a lot of trouble.

Mr. Callister: That is all.

Trial Examiner Myers: Any questions, Mr. Royster?

Mr. Royster: Yes, I have one or two questions.

Cross-Examination

Q. (By Mr. Royster) When did you have a conversation with Jack Benton in which he expressed dissatisfaction with the job as foreman?

A. About January 25, 1944.

Q. Are you sure it was as late as January 25?

A. Not positive. [161]

Q. Could it not be as early as the 10th of January?

A. It could have been, but I don't think so.

Trial Examiner Myers: What is your best recollection as to when this conversation took place?

(Testimony of H. B. Divine.)

The Witness: For this reason: that I was only about a week in getting another man to take his place so that it what I base the fact on.

Trial Examiner Myers: It that the only conversation you had with Benton about being relieved of work?

The Witness: Yes, sir.

Trial Examiner Myers: Did he ever express his dissatisfaction with the job as foreman prior to that time?

The Witness; No, sir.

Trial Examiner Myers: Just once?

The Witness: Just once.

Q. (By Mr. Royster) Now, is it not true, Mr. Divine, that in that conversation with Jack Benton, in which he expressed dissatisfaction with the pay he was getting for the foreman job that he asked you if you couldn't get some more money for him?

A. He asked me if it was possible.

Q. To get more money?

A. I didn't know whether it was or wasn't.

Q. That is about what you told him, is it not, that you didn't know whether or not it was possible?

A. Yes.

Q. Did he at that time express a desire, if you could not find a way to get him more money, to work as a mechanic?

A. Yes, he did.

Q. He is a good man too, is he not, Mr. Divine?

A. I haven't been around Jack Benton long enough to tell you.

(Testimony of H. B. Divine.)

Q. You know him by reputation, don't you? You know he has a reputation of being a good heavy truck mechanic?

A. Well, I have heard pro and con.

Mr. Callister: What was that?

The Witness: I have heard pro and con.

Q. (By Mr. Royster) Now, who did you hire to replace Jack Benton?

A. G. W. Hollenback.

Q. From whom did you hire Mr. Hollenback?

A. Mr. Hollenback was working for Wells, Inc. at the time.

Q. You promoted Mr. Hollenback to Mr. Benton's place? A. That is right.

Q. Had Mr. Hollenback worked with you before? A. Yes.

Q. Where?

A. He worked for me at Elko, Nevada, and also for me at Las Vegas, Nevada.

Trial Examiner Myers: That is when you were working for [163] other corporations of the Wells brothers?

The Witness: Wells Cargo, yes.

Q. (By Mr. Royster) Did Mr. Hollenback come up to Reno to work for Wells, Inc. about the same time you did? A. Yes.

Q. Had he worked in the capacity of assistant under you at these other operations?

A. The latter part of the Las Vegas operation.

Trial Examiner Myers: When was that?

(Testimony of H. B. Divine.)

The Witness: That would be about August and September, 1944.

Q. (By Mr. Royster) Are you a member of the International Association of Machinists, Mr. Divine?

A. Not at the present time.

Q. Were you in December, 1944 or January, 1945?

A. No.

Mr. Royster: I believe that is all.

Redirect Examination

Q. (By Mr. Callister) Have you ever been a member?

Trial Examiner Myers: Wait a minute. Mr. Apperson, any questions?

Mr. Apperson: No questions.

Trial Examiner Myers: You may proceed.

Q. (By Mr. Callister) Have you ever been a member?

A. Yes. [164]

Q. Mr. Divine, can you tell us why you stated in your opinion a man who has been foreman will not work out as a mechanic? I think you stated you told that to Mr. Benton, is that correct?

A. That is right.

Q. Can you tell us why, if you know?

A. Well, I have run shops since 1930 and I have tried demoting several foremen to mechanics and they won't concentrate on the work. They are constantly criticizing, and for that reason I didn't want to try Jack Benton as an ordinary mechanic.

Q. Were you told by anybody to discharge Jack or find some excuse to get rid of him?

(Testimony of H. B. Divine.)

A. No, sir.

Q. It was done entirely because of the conversation you had with Mr. Benton? A. Yes, sir.

Mr. Callister: That is all.

Recross Examination

Q. (By Mr. Royster) Well, now, Mr. Divine, in other instances in your experience you say it has proven unsatisfactory to demote a man. Well, here was a situation where the man was requesting the demotion.

A. Yes, he requested it.

Q. In the other instances that you have reference to was [165] that the situation there, or was it a part of the management's determination that the man should be demoted? A. I don't recall.

Q. Would you not say that there might be a distinction in the man's attitude towards his work if the demotion is voluntary and if it is involuntary?

A. It is possible.

Q. Now, you had a conversation with Jack Benton, in which he made a certain request of you?

A. Yes.

Q. Did you, up until the date that you discharged Jack Benton, tell him that you had decided that you could not get more money for him?

A. No.

Q. Well, is it true then that after Jack Benton told you that he was dissatisfied with the foreman job, unless he could get more money, and failing to get more money he would like to go to work as

(Testimony of H. B. Divine.)

a mechanic, you had no conversation with him until five minutes to six that January 31st you discharged him?

A. The last conversation I had with him was about January 25th. I had no further conversation with him until I told him that I had the man to replace him.

Q. In the meantime from January 25th, as you say, and until January 31st, you determined in your own mind to find a [166] replacement for Jack Benton and discharge him, is that correct?

A. Yes, he requested it.

Q. Well, now, he had requested either more money for his work as foreman or a transfer to a mechanic's job, isn't that so? A. Yes.

Q. In the meantime, in the five or six-day period, without making known to Jack Benton your determination, without going to him and saying, "I am sorry, Jack, we can't do a thing for you on more money", you made up your mind to discharge the man and at five minutes before quitting time on the 31st you did discharge him?

A. I didn't discharge him.

Q. Who did?

A. I told him that I had his release; he had requested another foreman to be put in his place.

Q. He had requested more money for his job as foreman, had he not? A. Yes.

Q. Did you consider that a resignation?

A. Yes, I would.

Q. A man has to be pretty careful what he says around you.

(Testimony of H. B. Divine.)

Trial Examiner Myers: Don't argue with the witness.

Q. (By Mr. Royster) Well, it is your testimony now that [167] you did not discharge Jack Benton?

A. Well, it would be subject to controversy, you could call it whatever you please.

Q. What did you consider you did?

A. I consider I replaced him as he requested.

Q. Did he request that you replace him?

A. Yes, if I couldn't get him more money.

Q. And if he could go to work on the night shift or as a mechanic, isn't that correct? Isn't it true that Jack Benton did not quit that job? You know what quit means and what discharge means. Now, you know whether he quit or was discharged. Which was it?

A. Well, he came back the following morning and told me after this last conversation that he had decided that I had fired him. He didn't decide that that night.

Q. No matter what Jack Benton decided, you knew what you were doing, did you not, at five minutes to six that night? What did you do five minutes to six on the 31st, did you discharge Benton or accept his resignation?

A. Well, if you want to call it that, he was discharged.

Mr. Royster: That is all.

Mr. Callister: That is all.

Trial Examiner Myers: You are excused, sir.

Thank you very much.

(Witness excused. [168])

Trial Examiner Myers: Will you call your next witness, Mr. Callister?

Mr. Callister: Mr. Examiner, at this time before I forget, we have made reference to this petition that Mr. McBride stated he signed, and I think for the purpose of the record, and I suggest this to Mr. Royster, that this be made a part of the record. I think the Board should have it.

Trial Examiner Myers: Are you offering it in evidence?

Mr. Callister: If Mr. Royster does not desire to do so, I will.

May I have it, Mr. Royster.

Mr. Royster: Yes, you may have it, Mr. Callister. Are you offering it in evidence?

Mr. Callister: Yes.

Trial Examiner Myers: Any objection?

Mr. Royster: No objection.

Trial Examiner Myers: There being no objection, the paper is received in evidence, and I will ask the Reporter to please mark it as Respondent's Exhibit No. 1.

(Thereupon the document above referred to was received in evidence and marked Respondent's Exhibit No. 1.)

Mr. Callister: Mr. Examiner, Mr. Royster desires, and I think it is proper, that we have your order that we may replace it with a duplicate copy so they may have the original, [169] which is perfectly agreeable with us.

Trial Examiner Myers: Very well, you may substitute two copies in lieu of the original.

Mr. Callister: Mr. Divine, I would like to ask you a couple of questions in regard to this file, if I may, Mr. Examiner.

Trial Examiner Myers: Go ahead.

Mr. Callister: Please take the stand again.

H. B. DIVINE

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Callister) Would you please look at Respondent's Exhibit 1 and tell me if there are any signatures that appear thereon who have a job classification other than mechanics, and if so, read the names to the Reporter, please, and designate what job classification they had from the date on which this particular petition appears, December 18, 1944?

A. D. A. Jensen, greaser; M. McCloud, greaser; E. S. Casinella, foreman; Vernon Burna, shovel operator; James D. Harrison, greaser; Ray Reisbeck, tireman.

Mr. Callister: That is all.

Trial Examiner Myers: You are excused. [170]
(Witness excused.)

Trial Examiner Myers: Off the record.
(Discussion off the record.)

Trial Examiner Myers: On the record.

We will stand adjourned now to 9:30 tomorrow morning.

(Whereupon, at 4:30 o'clock p.m., Friday, August 24, 1945, the hearing was adjourned until tomorrow, Saturday, August 25, 1945, at 9:30 o'clock a. m.) [171]

Saturday, August 25, 1945.

PROCEEDINGS

Trial Examiner Myers: Are you ready, Mr. Callister?

Mr. Callister: I am, Mr. Examiner.

Trial Examiner Myers: Are you ready, Mr. Royster.

Mr. Royster: Yes.

Mr. Callister: Last night, Mr. Examiner, I withdrew Respondent's Exhibit 1 for the purpose of having photostatic copies made at the request of Mr. Royster, Attorney for the Board, and I have this exhibit which I give back to you, Mr. Royster, and I will give to the Board, the Examiner, a photostatic copy of it, if that is agreeable.

Trial Examiner Myers: You may substitute the photostat in lieu of the original. Give two copies of the photostat to the Reporter.

Mr. Callister: Mr. Wells, will you take the stand, please?

J. W. WELLS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: J. W. Wells.

Trial Examiner Myers: What does the "J" stand for?

The Witness: Joe W. Wells.

Trial Examiner Myers: Where do you live, Mr. Wells? [173]

The Witness: 1453 Michigan Avenue, Salt Lake City, Utah.

Trial Examiner Myers: You may be seated, Mr. Wells, and you may proceed, Mr. Callister.

Q. (By Mr. Callister) Mr. Wells, what is your position with the Wells, Inc., Respondent herein?

A. President.

Q. How long have you been in that capacity?

A. Since 1936.

Q. Mr. Wells, I think you were here in the hearing room yesterday when Mr. McKay, Mr. McShane and Mr. Anderson testified, were you not?

A. Yes, sir.

Q. You will recall that they testified to certain conversations they purported to have had with you, the first being on May 16th, 1944 at Henderson, Nevada, and then subsequent conversations.

I wish you would, Mr. Wells, tell us in substance and effect what those conversations were that you

(Testimony of J. W. Wells.)

had with Mr. McShane and Mr. Anderson and Mr. McKay and designate to us who was present and where they were when you relate the conversations. I would suggest that I call your attention to the first conversation in Henderson, which is close to Vegas, I assume, Las Vegas, Nevada, where you had the first conversation. [174]

A. Well, I had been meeting with Mr. Glen Anderson and Mr. McShane for a period of several months prior to May 16, while we were negotiating the contract for Wells Cargo, Inc.

Q. Now, is that a different corporation from the Respondent herein, Wells, Inc.?

A. Yes. Wells Cargo, Inc. is an entirely separate company than Wells, Inc.

Q. I see.

A. And on May 16th the contract for Wells Cargo was finally completed and signed by both Mr. McShane and Mr. Anderson and myself. After the conclusion of the signing of the contract, why, Mr. McShane brought up the fact that he would like to work out something in the Reno territory. I think he had specifically in mind more about Luning, he was trying to tie Luning.

Q. What do you mean by Luning? Where is that?

A. Luning, Nevada is 26 miles south of Hawthorne.

Trial Examiner Myers: He means what is there that Mr. McShane wanted to tie in?

(Testimony of J. W. Wells.)

The Witness: We have shops located at Luning, Nevada operated by Wells, Inc.

Q. (By Mr. Callister) That is what I want to know.

A. And we had mechanics there that originally belonged to the American Federation of Labor Teamsters and were signed up by the Teamsters.

Mr. McShane and Mr. Anderson called on these men.

Q. Coming back to your conversation, Mr. Wells, on May 16th, did they discuss Luning as well as Reno?

A. Yes, I believe they were discussing primarily Luning and Reno also.

Q. What did they say and what did you say?

A. Mr. McShane asked me if I would be willing to enter into a contract for the machinists, for the shop employees in Reno and Luning and I said at the time that I would be if he could show me that he represented, had a representative group of men in my employment at that time.

Q. Then what was said, if anything?

A. I believe he told me that they had one or two men already belonging to the Machinists Union. My shop superintendent, I believe, had a card that he had always carried.

Q. Who was your shop superintendent?

A. O. A. Richer, superintendent, had a card that he carried all the time, and there may have been one or two others. That is all that I recall.

And he told me that they would contact the men

(Testimony of J. W. Wells.)

and furnish me with additional information that they represented the majority of the men in my Reno shop. I think that is about all that took place that I recall pertaining to this matter.

Q. I hand you Board's Exhibit 5 and ask you if you ever received [176] a copy of this, which is dated August 8th?

A. Yes, I did receive a copy of this letter.

Q. I call your attention specifically, Mr. Wells, to where it says "We will submit proof of this representation at the first meeting with you."

A. That is right.

Q. Subsequent to August 8th did you have a meeting with them?

A. I can't be too specific about dates. I met with Mr. McShane and Mr. Anderson, I would say, on, oh, fifteen or twenty times.

Q. Where was this?

A. Well, I met them in Las Vegas, I used to see Glen Anderson practically every day, every few days, in Las Vegas. Mr. McShane was doing considerable traveling and he was working on a job, I believe, at Morenci, Arizona. A lot of time was consumed in there and we had tried to get together on some meetings. He would either be going to Arizona or I would be headed for Salt Lake City or some place, but I saw him in Las Vegas and at Henderson, at Luning and at Reno.

Q. Now, let us tie this in, Mr. Wells. When would you say you met with him after August 8th?

Would you give us just an approximate time and place in respect to this Reno situation?

A. That letter, I did not receive, I did not read the letter [177] myself until some time in September. I took a vacation in August and I left Las Vegas, I believe, on August 7th and came to Reno, and I met Mr. McShane in front of my shop. He told me and informed me——

Q. (Interposing) Where was this?

A. At Reno, Nevada.

Q. Approximately when?

A. Oh, I would say around August 10th, 12, along in there somewhere. I was leaving on my vacation and I briefly talked with him for several minutes in front of the shop.

Q. What did you say and what did he say?

A. He asked me when we were going to be able to get together for a meeting. I told him I wouldn't be back from my vacation until around Labor Day and that I would be in Vegas, I would return directly to Las Vegas and he could contact me there and we would try to get together and arrange a meeting.

Q. Then when did you meet with him, if you recall, Mr. Wells? Approximately when?

A. Well, I would say it was some time in the latter part of September or first part of October.

Q. Where was this meeting held?

A. I believe he came to the shop at Henderson.

Q. That is near Las Vegas?

A. That is near Las Vegas, yes, that is where we had our shops, at Henderson. [178]

(Testimony of J. W. Wells.)

Q. Tell us the substance of that conversation, if you will.

A. He and Mr. Glen Anderson were there and they had several slips showing that they had contacted the men and that they had several men signed up agreeable to have the Machinists Union represent them, and I looked over these slips and——

Trial Examiner Myers: Do you know what was on the slips?

The Witness: Yes, I do. I believe they are the same slips or similar to the ones that were entered.

Q. (By Mr. Callister) I hand you Board's Exhibit 2(a) and ask you if that is what you are referring to, Mr. Wells?

A. Yes, this is the same slip they showed me.

Q. Then what did you say, if anything, after you looked at these slips?

A. I asked McShane and Anderson if they claimed representation of all the men that they had signed up on these slips and he said, Yes, that they did, they were going to have more signed, but this was a representative group.

Immediately upon looking at these slips I noticed that several men and employees were classified as greasers, washers and tiremen and so forth, and knowing the previous contracts we have with the AF of L Teamsters Union——

Q. (Interposing) What do you mean by "knowing" them? What were you referring to?

A. We have had contracts with the Teamsters Union. [179]

(Testimony of J. W. Wells.)

Q. Where? A. Here in Reno?

Q. All right, go ahead.

A. And Luning.

Trial Examiner Myers: You mean Wells, Inc.?

The Witness: Wells, Inc., yes. Where they represented the greasers and washers and tiremen.

So, after looking over these slips and determining the fact that the Machinists Union was claiming jurisdiction of these men, I immediately asked Mr. Anderson and Mr. McShane to definitely define the unit that they intended to represent for Wells, Inc.

Q. (By Mr. Callister) Can you tell us why you did that, if there was any reason for it?

A. I was definitely afraid of a jurisdictional dispute.

Q. With whom?

A. Between the Teamsters Union and the AF of L Machinists Union, both claiming representation of the same men.

Q. Well, Mr. Wells, could you tell me, did you ever have a conversation with the Teamsters representative, whether they represented the greasers and washers and tiremen and so forth?

A. Yes. After this meeting with Mr. McShane and Mr. Anderson.

Trial Examiner Myers: What meeting is that?

The Witness: This in Las Vegas.

Trial Examiner Myers: You mean the one——

The Witness: (Interposing) We just 'talked about.

(Testimony of J. W. Wells.)

Q. (By Mr. Callister) The latter part of October?

A. The latter part of September or first of October, 1944. I arrived in Reno and contacted Mr. Harry Anderson.

Q. Who is he?

A. Business Agent for the Teamsters Local in Reno, Nevada.

Q. The same Harry Anderson that was at this meeting all day yesterday?

A. Yes, sir. I told them that it looked to me that the Machinists were trying to claim jurisdiction of the greasers and washers and other men that I felt belonged to the Teamsters Union, due to our prior contracts.

Q. Did you have any further conversation with Mr. Anderson at that time? Did he say anything about it?

A. Yes, he said definitely that the greasers, the washers, the hostlers, the tiremen, and the parts men belonged to the Teamsters, come under the Teamsters' jurisdiction.

Q. Did he say anything whether he would permit the Machinists to have them under their jurisdiction, was anything said in regard to that line of thought?

A. He said, No, he would definitely—the men belonged to him and he would represent them and we would get into trouble if we negotiated with the Machinists signing up these employees. [181]

(Testimony of J. W. Wells.)

Q. Now, when you say "these employees", who do you refer to?

A. Greasers and washers.

Q. Coming back to your conversation the latter part of October just referred to, was anything else said by you, in other words, how was the meeting left, with any understanding or conversation? What was it? Just tell us.

Trial Examiner Myers: Wait a minute, are you referring to the meeting that he said took place the latter part of September or the beginning of October?

Mr. Callister: Yes, I stated the one in October.

Q. (By Mr. Callister) That was the meeting with Mr. Anderson and Mr. McShane.

A. This is the meeting I had in Las Vegas.

Q. I am calling your attention back to that now.

A. No, the only thing we decided on that, we should meet in Reno, Nevada and discuss it here in the territory where they were claiming jurisdiction.

Trial Examiner Myers: Who suggested that?

The Witness: I believe suggested that we should meet at Reno. I wanted to meet with my brother, Howard, and Bob and McShane and Anderson.

Q. (By Mr. Callister) Mr. Wells, I hand you Board Exhibit 8, which is a telegram, and ask you if you ever sent that.

A. Yes, I sent this. [182]

Q. I call your specific attention to where it

(Testimony of J. W. Wells.)

states that you sent this to Mr. McShane at Reno and states:

“You promised at least ten days notice before meeting.”

Did you have a conversation with regard—with Mr. McShane at that time, and I now refer to October, 1944, at Vegas, that he would give you ten days notice before a meeting to be held at Reno?

A. Yes, we were closing down the government contracts that we had at Las Vegas and it was pretty hard for me to go away. Evidently when I sent this wire I had already scheduled a trip out and he wanted to meet with me immediately and I asked him and we had a prior agreement that we would give each other sufficient time to arrange a meeting.

Q. Now, when was the next time that you met with Mr. McShane, if you know, and where and when and who was present, or was any of the Union Business Agents of the Machinists?

A. The next meeting that I recall after our meeting in Vegas, I was down in front of the Machinists Union office in Las Vegas, Nevada, and I talked with Mr. McShane and Mr. Anderson briefly.

Trial Examiner Myers: When was this, can you fix the date or the approximate date?

The Witness: I would say the latter part of October or the first part of November.

Trial Examiner Myers: Was it prior to receipt of the [183] telegram from Mr. McShane?

The Witness: No, it was after that time.

(Testimony of J. W. Wells.)

Trial Examiner Myers: Because the telegram was dated October 30, 1944.

The Witness: It was after, I am sure, that telegram was sent.

Trial Examiner Myers: Could you tell me about how many days after or how many weeks after?

The Witness: No, I don't believe I could tell you. The only thing that I know, it was after our meeting in Vegas and prior to our meeting in Reno with the Labor Conciliator, so possibly sometime during the month of November.

I talked with Mr. McShane and Mr. Anderson at the time, I believe I was sitting in my car and they came out and talked to me and they said, "Well, what is going to happen about this Reno contract?" I told them that until they definitely established the unit that they intended to represent that I could not bargain with them. Mr. McShane says, "Well, we will have to call in a Labor Conciliator in that case, and if we cannot get together on that basis."

I said, "That is perfectly agreeable with me if you want to call in a Labor Conciliator, you go ahead," which he did.

By Mr. Callister:

Q. All right, now, what happened after that? When did you meet again, if any? [184]

A. We met with the Labor Conciliator.

Q. When and where? A. Here in Reno.

Q. About what time?

A. The Reno office, I believe in the month of December.

(Testimony of J. W. Wells.)

Q. What was present, Mr. Wells?

A. Mr. McShane, Mr. Curtin.

Q. Who is Mr. Curtin?

A. He was the Conciliator sent in from San Francisco.

Q. Who else?

A. Howard Wells and myself.

Q. Now, what took place there, what did you say and what was said by the other people?

A. The main purpose of the meeting was to determine what unit——

Mr. Royster: I ask that the answer so far given by stricken as not responsive to the question.

Trial Examiner Myers: Strike out the question. The Reporter will read the question to the witness.

(Question read by the Reporter.)

A. Well, we met in the office.

By Mr. Callister:

Q. You mean your office of Wells, Inc.?

A. The office of Wells, Inc., and tried to get——

Mr. Royster: (Interposing) Same objection.

Trial Examiner Myers: Don't break in on the witness. [185] It is very confusing. Let the witness answer and if any part of it you think should be stricken, I will entertain a motion to strike. Don't give us any conclusions. "Tried" is a conclusion. Tell us what was done and said there, as Mr. Callister asked you.

The Witness: I asked Mr. McShane to specifically tell me the unit that he intended to represent. He got out a pencil and a piece of paper, sitting at

(Testimony of J. W. Wells.)

the desk, and he says, "What men do you think we should represent, what about these classifications?" and we talked back and forth with the Conciliator and Mr. McShane and we were never able nor did we ever get from Mr. McShane the unit that he intended to represent, even with the Conciliator there.

By Mr. Callister:

Q. Mr. Wells, when he stated to you, Mr. McShane, "What men do you want us to represent?" what did you say to that, if anything? Did you make any statement?

A. I don't recall whether I made any particular statement or not.

Q. What else was said, Mr. Wells, if anything, in regard to this unit, do you recall?

A. When the meeting adjourned, Mr. McShane was supposed to furnish us a copy of the unit he intended to represent, along with a copy of a contract that we asked for, to specifically show—the reason we asked for this contract was that we were not able to get the unit, get him to tell us what unit he represented. We asked him for a contract, so the contract would show, figuring the contract would show the unit that he intended to represent. He never furnished us that material.

Q. Mr. Wells, when was the first time you ever heard the unit requested that they were going to represent?

A. Yesterday morning I heard the stipulation by the Machinists Union here, was the first time that

(Testimony of J. W. Wells.)

I had ever heard the unit that they were going to represent.

Mr. Callister: Mr. Royster, I do not know whether this is improper, Mr. Examiner, I will submit it to you and if you want it off the record or on, it doesn't make any difference to me. I assume that the Government or the Board has in their possession or the Union has, who is present here this morning, other authorizations than those which they submitted yesterday. In other words, Mr. Wells has testified that he saw other authorizations than those which are incorporated in what may be termed the Board's Exhibit 2, which referred to job classifications of individuals other than mechanics, particularly greasers, and I will ask the Union or the Government here if they have such authorizations with them.

Mr. Royster: I can look. I believe that we do have such authorizations.

Trial Examiner Myers: Off the record. [187]

(Discussion off the record.)

Trial Examiner Myers: On the record.

While you are looking over those papers, Mr. Callister, I will ask Mr. Royster to let me have the originals of Exhibit 2. I would like to compare them with the copies that he submitted and also with the payrolls that are in evidence.

Off the record.

(Discussion off the record.)

Trial Examiner Myers: On the record.

Mr. Callister: I wonder if the Reporter would

(Testimony of J. W. Wells.)

mark these Respondent's Proposed Exhibits 2(a), (b), (c) and so forth?

(Thereupon, the documents above referred to were marked Respondent's Exhibits 2(a) through (f) inclusive for identification.)

Mr. Callister: Mr. Royster, I hand you Respondent's Proposed Exhibit 2(a), (b), (c), (d), (e) and (f) and ask you if you will stipulate that they are copies of the originals.

I asked Mr. Royster for the originals and apparently he hasn't got them and these come from his files, so I assume they are copies of the originals, are they not, Mr. Apperson?

Mr. Apperson: I wouldn't know myself. Maybe Mr. Royster [188] would know.

Mr. Callister: They are from Mr. Royster's files and I would assume they are copies. But I assume that it would be best to have in the record, that they were copies.

Mr. Royster: The Board will so stipulate.

Mr. Callister: And that the names which appear thereon are the signatures of the individuals?

Mr. Royster: Yes.

By Mr. Callister:

Q. Mr. Wells, I hand you Respondent's Exhibits 2(a) to 2(f) inclusive and ask you if you recall whether the names of those individuals who appear thereon were included in the list of authorizations which you have heretofore testified to were presented to you at a meeting by the Union. Will you look them over carefully and see if those names

(Testimony of J. W. Wells.)

were included in that group of authorizations you have referred to this morning, as best you can recall?

A. I couldn't testify that every one of them, but I do see two in particular here that were not shown to me in Las Vegas.

Q. Would you say the rest were?

A. I don't think they were, no.

Trial Examiner Myers: You do not think any of them were?

The Witness: No, I wouldn't say that. I would say the majority were not shown in in Las Vegas.

By Mr. Callister:

Q. What I am now asking, Mr. Wells, the [189] names that appear on these exhibits, that is Respondent's 2(a) to 2(f), inclusive, were those names on authorizations of which you have referred to in your conversation this morning?

Do you understand my question?

A. No. Let me have it again.

Q. You recall, Mr. Wells, you testified previous to this recess that you had a conversation in which Board's Exhibits 2, that is, similar authorizations to those, were presented to you, which you looked over. You recall that? A. That is right.

Q. And you further stated that you found that there were some names on these lists of authorizations that were not mechanics, and you called that to their attention.

Now, I am asking you those names that were in that list of the group that were presented to you

(Testimony of J. W. Wells.)

by the Union that morning, are any of them the same as which we now refer to as Respondent's Exhibits 2(a) to 2(f), inclusive? In other words, were any of the names that appear on these slips included in those authorizations that you referred to? Have you even seen them before?

A. Yes. Some of these names appears in the group that they showed me at the time when they showed the entire group of authorizations that they had from employees.

Q. Now, Mr. Wells, I notice the name of Ray O. Falk on [190] Respondent's Exhibit 2(a). What was his job classification June 3, 1944, if you know?

A. Parts man.

Trial Examiner Myers: Was his authorization shown to you at that meeting, by Mr. McShane or Mr. Anderson?

The Witness: Yes, it was.

By Mr. Callister:

Q. I note Mr. Jack Benton's signature appears on this authorization, Respondent's Exhibit 2(b). Did you see that at that time?

A. I don't believe I saw the one from Benton at that time.

Q. The name of S. A. Williams, on Respondent's Exhibit 2(c)?

A. I wouldn't say for too sure about S. A. Williams.

Q. What was his job classification June 3rd, the date of this exhibit? A. Greaser.

Q. O. A. Jensen, Exhibit 2(d), what was his

(Testimony of J. W. Wells.)

job classification, if you know? Well, that is 12/25.

A. 12/25 he was a greaser.

Q. He was a greaser? A. Yes.

Trial Examiner Myers: Was his authorization shown to you at that meeting?

The Witness: No.

By Mr. Callister:

Q. Dewey A. Lambert, what was his job [191] classification, that is 2(e).

A. He is a greaser.

Q. Did you see that authorization at that time?

A. No, I don't believe Lambert's was there.

Q. Now I show you O. A. Richer. What was his job classification at that time?

A. Superintendent of maintenance.

Q. Did you see his authorization at that time?

A. I don't think they showed it to me at that time.

Mr. Callister: I would like to have these introduced, if I may, Mr. Examiner.

Mr. Royster: No objection from the Board.

Mr. Apperson: No objection from the Machinists.

Trial Examiner Meyers: There being no objection, the papers are received in evidence and I will ask the Reporter to please mark them Respondent's Exhibit 2(a) through and including 2(f).

(The documents heretofore marked Respondent's Exhibits Nos. 2(a) through 2(f), inclusive, for identification, were received in evidence.)

(Testimony of J. W. Wells.)

By Mr. Callister:

Q. Now, Mr. Wells, coming back to your conversation that you referred to with the Union in respect to these authorizations, as I recall, you stated that in that list or group you noticed other than mechanics in the authorizations. [192]

A. Yes.

Q. And that is the time that you called that to their attention, is that it?

A. That is correct.

Mr. Callister: You may cross examine.

. Cross Examination

By Mr. Royster:

Q. What office do you hold in Wells Cargo, Mr. Wells? A. President.

Q. Now, you mentioned that both you and Mr. McShane——

Trial Examiner Myers: Before you on that, I just want to clear up about that Wells Cargo. Who are the other officers of that operation? Are they your brothers?

The Witness: Yes, similarly the stockholders and officers of both corporations are almost identical.

Trial Examiner Myers: That is to say that your brothers Howard and Robert are also stockholders and officers of the Wells Cargo?

The Witness: That is correct.

Trial Examiner Myers: And the three of you own all the stock or approximately all the stock?

The Witness: I would say the majority of stock.

(Testimony of J. W. Wells.)

Trial Examiner Myers: Of both corporations?

The Witness: Both corporations.

Trial Examiner Myers: All right. I am sorry to break [193] in.

By Mr. Royster:

Q. You mentioned that you and Mr. McShane both traveled about a good bit and there was some difficulty in meeting. Did you ever offer to meet with Mr. McShane at a time when he stated he was unable to meet with you?

A. Yes, I recall one time we had a meeting scheduled and he was going to be gone for some thirty days, he told me, I believe it was some trouble or some work that he had to do somewhere in Arizona, I believe Morenci, Arizona.

Q. When was this tentative meeting scheduled?

A. I don't know, that was possibly in July, June or July.

Q. When was the arrangement for the meeting made?

A. I recall that I had a conversation with Mr. McShane and told him that I would be available. He told me that he wouldn't be available. I can't tie any specific dates to this, but he told me he wouldn't be available, he had to go to Arizona, but Glen Anderson would be out to see me.

Q. What was it proposed that you discuss at this meeting, for what purpose was the meeting to be held?

A. I believe they wanted to talk about the Reno operation.

(Testimony of J. W. Wells.)

Q. About securing recognition from Wells, Inc., for machinists? A. I believe so.

Q. Now, Mr. Wells, you stated that Wells, Inc. is under [194] contract with the International Brotherhood of Teamsters.

A. Well, yes, sir.

Q. Do you have a copy of that contract with you? A. No, I don't at the present time.

Q. Could you get it for us?

A. I believe we can.

Mr. Callister: We will be happy to give you a copy, Mr. Royster.

By Mr. Royster:

Q. When did you first discuss with Mr. Harry Anderson, representative of the Teamsters, any question involving the greasers?

A. I talked to him two or three times about it, last fall, I would say from during the months of October and November.

Q. That was after the time when you saw names of greasers on Respondent's Exhibit 2?

A. Yes, that is correct.

Q. Mr. Wells, do you have knowledge of a Form 10 recently filed with the Regional War Labor Board in San Francisco affecting wages of some of your employees in the Reno shop?

A. I am not familiar with it, no.

Q. Can you tell me who, if anyone, in your organization would be familiar with such a document if it were filed?

(Testimony of J. W. Wells.)

A. I think my brother Howard would probably be able to tell you that.

Q. Do you recall in the conversation with Mr. McShane at [195] Las Vegas on a date which he testified as October 5, 1944, and which I believe you placed in early October or late September, that after examining the authorizations which he then presented to you, you said: "Hell, you've got everybody on here but me!"? A. That is correct.

Q. Now, is it correct to say, Mr. Wells, that after talking to Mr. Harry Anderson last October or November, you feel that the washers, greasers, tiremen, come within the jurisdiction of the Teamsters Union and not the jurisdiction of the Machinists?

A. Well, I don't know, I still feel there is some question. I don't know who really does claim jurisdiction of them.

Q. Now, you testified that in a meeting of December 22nd, 1944, that Mr. McShane took a piece of paper and in the discussion of the unit wrote down what he considered to be the bargaining unit.

A. No, he didn't write down, he wouldn't give us the bargaining unit. He was trying to determine a classification. He was trying to switch some classifications around, but he didn't put anything down in writing, because that was just exactly what I was after, for him to put it down in writing.

Q. I show you Board's Exhibit 6, Mr. Wells, and ask if you recognize it.

(Testimony of J. W. Wells.)

A. I sure do. [196]

Q. What is it?

A. It is a copy of the contract between Wells Cargo, Inc. and Machinists Local of Las Vegas, Nevada.

Q. Is it the contract that was signed May 16, 1944?

A. That is correct.

Q. Now, do you recall in the meeting at Las Vegas in October, 1944, that a copy of this contract was used in your discussions?

A. Possibly a copy of it was used in our discussions, yes.

Q. Do you recall that Mr. McShane at that time told you that the Union desired to represent at Reno the same classifications of employees as it represented under this contract at Las Vegas?

A. No, I don't recall.

Q. Do you recall a discussion of the wages of Machinist Diesel Specialist?

A. I think we talked some about wages, possibly about Diesel Specialist wages.

Q. Do you not recall that you objected to having any such classification established in your Reno operation?

A. Possibly I did, yes.

Q. Do you have a recollection as to it?

A. No, I wouldn't say that I had.

Q. Do you recall at that meeting that in discussing the terms of an agreement or in your discussions, that you objected [197] to paying overtime pay after 40 hours or after 8 hours?

A. No, I couldn't say. The only thing that I

(Testimony of J. W. Wells.)

know, that we did have a general discussion regarding the contract.

Q. You had a general discussion, did you not, with regard to wages, hours and working conditions of the employees in the Reno shop?

A. No, I couldn't say that, no.

Q. Well, you said you had a general discussion of a contract. Will you tell us what your discussion pertained to?

A. Yes, I immediately, after he presented this to me, he said, "I would like to have the same contract we have at Las Vegas at Reno." I immediately said, "Well, before I can accept or look at any contract, you will have to tell me the unit that you are bargaining for." This came under specific instructions from my Attorney, that I could not bargain if I didn't want to get into a jurisdictional dispute until he told me the unit that he intended to bargain for.

Q. Then he told you what unit, did he not?

A. No, sir.

Q. Didn't he say it was the same unit as represented by the Union at Las Vegas?

A. No, sir.

Q. Now, you testified, if I recall correctly, that upon seeing the names of employees whom you knew to be greasers affixed to the authorizations shown to you on October 5th or [198] about October 5th, that you commented about that.

A. Yes, I said, "I think you got everybody in here but me."

(Testimony of J. W. Wells.)

Q. That was the extent of your comment?

A. No, I don't think so. I told him that I think he had other men in there besides the men that would come under the jurisdiction of the Machinists, my version of it.

Q. Well, now, did you tell him particularly what men you had reference to?

A. No, I don't think I did.

Q. Mr. Wells, do you know of your own knowledge whether or not there has ever been a petition filed by the Union here with the National Labor Relations Board seeking certifications as bargaining representative for the group of employees in the Reno shop?

A. I think my attorney could answer that better.

Q. The question is, Do you know of your own knowledge? A. No, I don't.

Q. In your operation under the contract that you have with the Teamsters——

Trial Examiner Myers: Have you got a contract at the present time with the Teamsters?

The Witness: Yes, we have at the present time a contract.

By Mr. Royster:

Q. I think I will reserve my further questions until I can see a copy of that contract. [199]

Mr. Callister: I will see if we can get you a copy right away. I imagine we will finish before noon. I will send someone over there.

(Testimony of J. W. Wells.)

Trial Examiner Myers: We will take a short recess.

(Short recess.)

Trial Examiner Myers: On the record.

By Mr. Royster:

Q. Mr. Wells, did you sign a contract with the Operating Engineers covering operations that you had in Mills Field, California?

A. No, I didn't sign a contract.

Q. Did your company sign such a contract?

Trial Examiner Myers: Which company is that?

By Mr. Royster:

Q. Wells, Inc.

A. I couldn't testify one way or the other, I didn't see it.

Q. You are President of Wells, Inc.?

A. That is correct.

Q. Don't you know whether Wells, Inc. has or has not signed such a contract?

A. No, I do not.

Q. Do you know whether or not Wells, Inc., has ever signed a contract with the Teamsters covering operations at Luning, Nevada?

A. Yes, I believe we have a contract there.

Q. It is true, is it not, that contract covered mechanics as [200] well as teamsters?

A. At one time it did, yes.

Q. And you were not greatly concerned about the jurisdictional aspects of that contract, were you?

(Testimony of J. W. Wells.)

A. At that time, as I recall, the AF of L Machinists Union was not a member of the affiliated labor organization.

Mr. Callister: What do you mean by that?

Trial Examiner Myers: I guess he means that at that time the International Association of Machinists was not affiliated with the American Federation of Labor.

Mr. Callister: That is what I want the record to show.

The Witness: That is correct.

By Mr. Royster:

Q. Was that the consideration which impelled you to sign such a contract without complaint?

A. Well, I think we were rather new in the game of contracts and so forth at that time.

Trial Examiner Myers: Did you negotiate a contract?

The Witness: Yes, I had something to do with it.

Trial Examiner Myers: Who else had something to do with it?

The Witness: Howard Wells.

Trial Examiner Myers: Who did the most of the negotiating?

The Witness: I would say Howard Wells did most of the negotiating on that. [201]

Trial Examiner Myers: Who negotiated the contract with the Teamsters for the employees at Reno?

The Witness: That is done by the Nevada Motor

(Testimony of J. W. Wells.)

Transport Association, it is a joint contract, we all participate, all the carriers.

Trial Examiner Myers: You mean it is a master contract?

The Witness: A master contract; yes, sir.

Trial Examiner Myers: And you are a member of this Association?

The Witness: Yes, sir.

Trial Examiner Myers: When I say you are a member, I mean Wells, Inc.

The Witness: That is correct.

Mr. Royster: I am afraid I have no further questions except on the contract.

Trial Examiner Myers: And it has not arrived yet?

Mr. Callister: Are you through?

Mr. Royster: Up to this point.

Mr. Callister: Is it agreeable with the Examiner that I examine?

Trial Examiner Myers: I was going to ask Mr. Apperson if he had any questions.

Mr. Apperson: No questions.

Trial Examiner Myers: Do you have any objections to Mr. Callister going ahead with his redirect?

Mr. Royster: I have none.

Redirect Examination

By Mr. Callister:

Q. Mr. Wells, your attention has been called to the Luning contract in which the machinists were a part of it and you stated, as I recall, that they were a part at one time, is that right?

(Testimony of J. W. Wells.)

A. That the machinists were a part of the contract?

Q. Yes, of the Teamsters contract at Luning.

A. No, the mechanics were under the jurisdiction of the Teamsters.

Q. I see.

On your Luning contract today are they still under the jurisdiction of the Teamsters, that is, a part of the Teamsters' contract, do you know?

A. No, the Teamsters Union withdrew there. I don't know just quite how to phrase it, but they withdrew their jurisdiction over the men at Luning.

Q. What men?

A. The mechanics, when the two, when the Machinists Union came back into the AF of L, that is my understanding.

Q. Now, do you know whether or not the tiremen, greasers and washers were part of that contract at Luning or not?

A. Yes, sir, they were.

Q. Do you know whether—put it this way:

Who has jurisdiction, or do you have a contract with the [203] Teamsters at Luning that incorporates the tiremen, greasers and washers at this time?

A. I am quite sure that they are included at the present time.

Q. In other words, when the machinists were taken out of the contract, that is the mechanics, the tiremen and greasers and washers did not go with the mechanics to the Machinists, is that right?

(Testimony of J. W. Wells.)

A. No, that is right.

Q. Now, Mr. Wells, I am going to show you Respondent's Exhibit 1, and you notice a date on there of December 18, 1944. Could you tell me whether the meeting you had with the Conciliator at which Mr. McShane was present was prior or subsequent to December 18, which is shown there on Exhibit 1, Respondent's?

A. I believe the meeting was December 22nd, which would make it subsequent to December 18th.

Q. Have you ever seen that petition before?

A. Not until yesterday.

Q. Mr. Wells, did you ever receive any correspondence or any information from either the War Labor Board or the Conciliation Division of the Department of Labor that your matter had been certified to the War Labor Board as a dispute?

A. No, it was never a dispute case.

Q. Did you ever hear from the Department of Conciliation, [204] did you ever hear from any Commission of Conciliation of the Department of Labor subsequent to your meeting you referred to of December 22, 1944, in regard to this matter? In other words, did you hear from them again after December 22nd?

A. No, we did not.

Q. Did you ever have another conversation with the Unions or anyone regarding this matter at your Reno operation regarding the machinists, after your meeting of December 22nd, 1944?

A. No, I have had no further conversations, to my knowledge.

(Testimony of J. W. Wells.)

Mr. Callister: That is all.

Trial Examiner Myers: What do you suggest now, gentlemen?

Mr. Royster: I have nothing to suggest, Mr. Examiner, but to wait for the arrival of the contract.

Mr. Callister: That is agreeable, Mr. Examiner.

Trial Examiner Myers: You may step down.

(Witness excused.)

Trial Examiner Myers: We will take a short recess.

(Short recess.)

Trial Examiner Myers: Will you take the stand please, Mr. Wells.

J. W. WELLS

resumed the stand and testified further as follows:

Trial Examiner Myers: Have you any further questions, Mr. Royster?

Mr. Royster: Yes, I have, Mr. Examiner.

Trial Examiner Myers: Will you kindly proceed.

Recross Examination

Q. (By Mr. Royster) Mr. Wells, I show you purports to be a collective bargaining contract. Will you tell me the parties to that contract?

Trial Examiner Myers: Is it a contract?

Mr. Callister: I will be happy to stipulate that

(Testimony of J. W. Wells.)

that is a contract, it is a copy but it is a copy of the original dated the 1st day of October, 1944, between the Teamsters Union and this Respondent, Wells, Inc., together with other transportation companies in this area, which is commonly referred to as a master agreement which was negotiated by the Association of which Wells, Inc., is a part.

Mr. Royster: I accept that stipulation, Mr. Examiner.

Trial Examiner Myers: And you, Mr. Apperson?

Mr. Apperson: I do.

Q. (By Mr. Royster) Mr. Wells, can you tell me the date that this agreement was signed?

A. The 26th day of October, 1944.

Q. Can you tell me what unit of employees it covers?

A. No, I cannot. It doesn't state the unit that it covers.

Trial Examiner Myers: Who signed that contract? [206]

The Witness: Harley A. Harmon, Manager, Nevada Motor Transport Association.

Trial Examiner Myers: Signed on behalf of Wells, Inc.?

The Witness: Yes.

Q. (By Mr. Royster) Can you tell me if there is any reference in that contract to greasers or tiremen?

Mr. Callister: We will stipulate there is not. We will stipulate that the contract only refers to line drivers.

(Testimony of J. W. Wells.)

Trial Examiner Myers: Do you accept that, Mr. Royster?

Mr. Royster: Yes.

Mr. Apperson: It is accepted.

Q. (By Mr. Royster) Does that contract, Mr. Wells, provide as a condition of employment that the workers which come within its provisions be members of the Teamsters Union?

Mr. Callister: We will so stipulate that it does.

Mr. Royster: That is agreeable.

Mr. Apperson: Agreeable.

Trial Examiner Myers: You accept the stipulation?

Mr. Royster: We accept the stipulation.

Trial Examiner Myers, and you, Mr. Apperson?

Mr. Apperson: Yes.

Q. (By Mr. Royster) Has Wells, Inc., ever been requested by the Teamsters Union to discharge any greaser, tireman, or washer for failure to obtain or maintain membership in the Teamsters Union? [207]

Mr. Callister: What operation?

Mr. Royster: At Reno.

A. I can't answer that. One of my brothers could probably answer that better. The Reno manager, I would say, could.

Trial Examiner Myers: Who handles the labor relations for Wells, Inc., for Reno?

The Witness: Mr. Bob Wells would handle that. It would come under his supervision.

(Testimony of J. W. Wells.)

Trial Examiner Myers: That is for the Reno Division?

The Witness: Yes, sir.

Trial Examiner Myers: Reno Division is the same as the Reno plant?

The Witness: Yes, sir.

Trial Examiner Myers: Has he always handled the labor relations for the Reno plant?

The Witness: Yes, he is Manager of the Reno operation and he handles the employees. He has jurisdiction of the trucks and equipment working out of here.

Trial Examiner Myers: When was Wells, Inc., first formed?

The Witness: 1936.

Trial Examiner Myers: Regarding this contract that you just were discussing, when does that contract expire?

The Witness: October. "This agreement shall be in effect on and after October 1st, 1944, and remain in force and effect until October 1st, 1945, and shall thereafter automatically [208] renew from year to year except that in case of either party desiring to change or terminate . . . will submit their notice thirty days in writing . . ."

Mr. Callister: It is a year contract with the automatic renewal clause.

Mr. Royster: No further questions.

Trial Examiner Myers: Mr. Apperson?

Mr. Apperson: No questions.

Trial Examiner Myers: Mr. Callister?

(Testimony of J. W. Wells.)

Mr. Callister: I have, Mr. Examiner.

Redirect Examination

Q. (By Mr. Callister) Mr. Wells, when you refer to Mr. Bob Wells having charge of labor relations, is that subject to your supervision and so forth? A. Yes, that is correct.

Q. Who signs the contracts for your labor relations, in other words? A. I do.

Q. Mr. Wells, I hand you herewith what is purported to be an agreement dated the 3rd day of July, 1943, between Wells, Inc., and the Teamsters Union, signed by yourself and H. A. Anderson, and ask you if you have seen that before.

A. Yes, sir, I have.

Q. And that is a contract affecting what operation, Mr. Wells? [209]

A. This is affecting our Luning operation of Wells, Inc.

Q. Mr. Wells, will you tell us what job classifications this Luning contract affects?

A. Mechanics, grease monkeys, drivers on small trucks, helpers and dumpers.

Q. In other words, Mr. Wells, at your Luning operation your contract provides that the Teamsters, which is the same in Reno, Mr. Harry Anderson, has jurisdiction of your grease monkeys, is that right? A. That is correct.

Q. Can you tell me who has jurisdiction of your grease monkeys in Reno, if you know?

A. Well, I am a little confused myself. I don't know exactly who has jurisdiction, whether the

(Testimony of J. W. Wells.)

Machinists are going to claim them or the Teamsters are going to claim them. That is what I believe the purpose of one of these things is, to determine the unit of who represents what men. In their contract the Teamsters don't call for jurisdiction of the grease men.

Q. Now, you are referring to the contract in operation between the Teamsters and yourself?

A. That is correct. The Machinists are out signing up the grease men to belong to their union. We have another contract here that is in operation at Luning, Nevada, and the Teamsters claim jurisdiction there. [210]

Trial Examiner Myers: You are referring to the July, 1943, contract?

The Witness: At Luning, Nevada, yes, sir.

Q. By Mr. Callister) As a matter of fact, they do have jurisdiction, that is the contract is entered into with them in which the greasers are a part of it, is that not correct? A. That is correct.

Q. Now, is this the same contract—I am now referring to Luning—that you stated previously in your testimony that you had a contract covering your mechanics as well as the greasers and teamsters, is that correct? Is this the same operation?

I will put it this way, Mr. Wells—previously, this morning you testified at Luning at one time your Teamsters contract included mechanics, you remember? A. That is correct.

Q. Then after the Machinists came back into the

(Testimony of J. W. Wells.)

AF of L, the mechanics were taken out of the contract, you so testified, did you not?

A. That is correct.

Q. Was that the same operation as this operation at Luning which I have shown you the contract dated the 3rd day of July, 1943, in which now the greasers continue to remain in the contract?

A. That is correct. [211]

Q. So I assume that what transpired was that first you had a contract at Luning covering your mechanics, greasers, monkeys, what they call grease monkeys, and line drivers and then the Machinists came and took jurisdiction of the mechanics, but left the greasers with the Teamsters, is that right?

A. At least the Teamsters gave up jurisdiction of the mechanics.

Q. But not the grease monkeys?

A. That is right.

Q. Now, I think you stated you had a conversation with Mr. Anderson in regard to grease monkeys. You asked him what his position was, is that right?

A. That is correct.

Q. What did he tell you?

A. Told me that the jurisdiction of the Teamsters Union were grease monkeys, parts men, dock helpers, tire men, washrack men, I believe that is essentially the main part.

Q. In respect to your Reno operation, up to this time have you ever recognized any labor organization as representing your grease monkeys, as they are termed, washers or greasers, or tiremen?

(Testimony of J. W. Wells.)

A. No, I don't believe we ever have.

Mr. Callister: That is all.

Mr. Royster: That is all. [212]

Trial Examiner Myers: You are excused. Thank you very much.

(Witness excused.)

Mr. Callister: Now, Mr. Royster, you stated you want to have Mr. Howard Wells return, because you said you want to submit information with regard to a Form 10.

Mr. Royster: Your questioning of Mr. Joe Wells made it unnecessary for me to ask Mr. Howard Wells any questions. The point I had in mind has been covered.

Mr. Callister: So there will be no question about it, in the Reno operation no Form 10 has ever been filed for the Reno operation. I think you had that question in mind and we have him here to testify if you so desire.

Trial Examiner Myers: Will you call your next witness, please?

Mr. Callister: We have nothing further, Mr. Examiner, we rest.

Trial Examiner Myers: Has the Union any witnesses it wishes to call?

Mr. Apperson: No further witnesses.

Trial Examiner Myers: Have you any rebuttal witnesses, Mr. Royster, whom you wish to call?

Mr. Royster: Mr. Callister has a document which he brought here on my request and I would

like to take a look at it first and then I can answer that question. [213]

Trial Examiner Myers: Very well, we will take a short recess while Mr. Royster examines the document.

(Short recess.)

Trial Examiner Myers: On the record.

Mr. Royster: Mr. Benton.

JACK BENTON,

a witness recalled by and behalf of the National Labor Relations Board, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Royster) You are the same Jack Benton who testified yesterday at this proceeding?

A. Yes, sir.

Q. Mr. Benton, you testified concerning your discharge by Wells, Inc., on January 31, 1945. Did you receive what is known as a release at the time or subsequent to your discharge?

A. Yes, sir.

Trial Examiner Myers: You mean an availability certificate?

The Witness: It is a separation slip, I think they call it, or something like that.

Q. (By Mr. Royster) Is that the type of slip that you take to the United States Employment Service Office? A. Yes, sir. [214]

(Testimony of Jack Benton.)

Q. Do you recall what was written on the slip when it was given to you by Wells, Inc.?

A. Yes, sir.

Q. Will you tell us what was written on it?

Mr. Callister: Just a minute. Objected to on the ground that it is not the best evidence. We should have the slip.

Mr. Royster: I will call upon you to produce it.

The Witness: They have a copy.

Mr. Callister: We will withdraw our objection. You may proceed.

Trial Examiner Myers: Will the Reporter please read the question to the witness?

(Question read by the Reporter.)

A. Discharge for lack of cooperation.

Mr. Royster: That is all.

Trial Examiner Myers: Any questions, Mr. Callister?

Cross Examination

By Mr. Callister:

Q. Mr. Benton, did you make any protest to the Company when you read that on your discharge slip?

A. No, sir, because I was discharged, I deserved it.

Q. You did deserve it?

A. If it was I was discharged, and that is the kind of slip I wanted.

Q. That is the kind you wanted?

A. I never resigned. I was discharged. [215]

Q. You know that there are other reasons why

(Testimony of Jack Benton.)

you were discharged, in addition to the fact that you would come to the shop——

Mr. Royster: (Interposing) Just a minute, Mr. Callister.

Mr. Callister: Let me finish and then you may make your objection.

Q. (By Mr. Callister) Mr. Benton, is it not true that you had been warned several times about drinking on the job, is that not correct?

A. I never drank on the job.

Q. You never were warned?

A. No, sir, I never drank on the job.

Trial Examiner Myers: Will you answer the question?

The Witness: No, I never.

Trial Examiner Myers: Any questions, Mr. Apperson?

Mr. Apperson: No questions.

Trial Examiner Myers: Any redirect?

Mr. Royster: No questions.

Trial Examiner Myers: You are excused.

Mr. Callister: Mr. Benton, just a moment, please, just one more question.

Q. (By Mr. Callister) Mr. Benton, do you ever recall coming down to the Wells, Inc. just prior to your discharge after you had been drinking rather heavily, or drinking, and [216] starting to cause a rumpus around the place?

A. I don't recall it, no.

Q. You wouldn't say you didn't would you?

A. I did not.

(Testimony of Jack Benton.)

Q. You didn't do it? A. No.

Mr. Callister: That is all.

Mr. Royster: That is all.

Trial Examiner Myers: You are excused, sir.
Thank you.

(Witness excused.)

Mr. Royster: Now, Mr. Examiner, I understand it is agreeable to counsel——

Mr. Callister: (Interposing) As to that, I am going to object on materiality, but I will stipulate that is the Constitution and By-Laws of the Machinists Union, of course.

Mr. Royster: Well, I offer the Constitution of the Grand Lodge, District and Local Lodges of the International Association of Machinists in evidence for the purpose of showing the jurisdiction claimed by the International Association of Machinists as shown on pages V through X of that document.

(Thereupon, the document above referred to was marked Board's Exhibit No. 9 for identification.)

Mr. Callister: Well now, Mr. Examiner, we object to the introduction of the same, but we will explain our objection. [217]

Trial Examiner Myers: Proceed.

Mr. Callister: We will stipulate that this is the Constitution of the International Association of Machinists. That is not our objection. We object to it for the purpose for which it is introduced on the ground that the same is immaterial, incompetent

and irrelevant. We think that any union may take jurisdiction of anything they want. For illustration, the Teamsters take jurisdiction of office workers and everything else different from what their primary object was, but the question here is not what they can do, but what did they do. We think the mere fact they have jurisdiction of everybody is not binding on the facts in the case and is therefore immaterial, incompetent and irrelevant.

Mr. Royster: The purpose of offering it is of course to bring into sharper definition the unit set forth in the contract between Wells, Cargo, Inc. and the International Association of Machinists covering the operation at Las Vegas, and the Examiner will recall that there has been testimony that a copy of that Las Vegas contract was shown to the respondent here and used, or attempted to be used at any rate, as a basis for negotiating a contract covering the Reno operation.

Mr. Callister: Mr. Royster, I do not get your point. There is no question that the Machinists Union can do as they [218] please and get anyone in that they want. You have stipulated here in open hearing that the union appropriate for the purpose of collective bargaining is only mechanics. Now, what bearing this can have on it I do not see, and we have already limited jurisdiction of the Machinists in this particular case because we have stipulated that the unit here should only be mechanics.

Mr. Royster: Well, to be a little more precise about it, perhaps we haven't limited their juris-

diction, we have agreed as to what constitutes the appropriate bargaining in the Reno shop.

Mr. Callister: That is right, they have jurisdiction over every trade in the world, but that is not material to us. I think the Machinists may come in and be bargaining agent of the Teamsters, if the Teamsters so designate them.

Trial Examiner Myers: I will overrule the objection and receive the book in evidence and ask the Reporter to mark it Board's Exhibit No. 9.

(The document heretofore marked Board's Exhibit No. 9 for identification was received in evidence.)

Mr. Royster: Mr. Examiner, an executed copy of Board's Exhibit 6 was placed in evidence.

Trial Examiner Myers: Is that the contract?

Mr. Royster: That is the contract. Mr. McShane has arranged for the preparation of copies of that instrument to [219] give to the Reporter. I understand that he expects them to be finished about noon and when they are completed I would like permission now to put in two of the copies and withdraw the executed original.

Trial Examiner Myers: Very well, you may do so, there being no objection.

Have you any further rebuttal?

Mr. Royster: No further rebuttal.

Trial Examiner Myers: No other witnesses you want to call, no other evidence you want to submit?

Mr. Royster: No, sir.

Mr. Callister: Mr. Examiner, this is a matter that I am a little in doubt as to, but I am going to

ask the question anyway, if you will bear with me and give me your indulgence.

Trial Examiner Myers: Certainly.

Mr. Callister: In the complaint——

Trial Examiner Myers: What paragraph, sir?

Mr. Callister: I am referring to paragraph 4. It reads that:

“All mechanics, mechanic helpers and greasers employed by the Respondent at its shop in Reno, Nevada constitute a unit appropriate for the purposes of collective bargaining.”

Now, apparently without any question the Union has given the Board information to base this allegation on. I do not [220] notice it in the charge. I do not know whether it is within the rules and regulations of procedure here to find out who gave that information to the Board. We are concerned with it, frankly, because testimony here of the Union has been consistently that they had a unit defined different from that which appears in paragraph 4 and the reason I am concerned is this, Mr. Examiner: is the fact that this thing is serious. In other words, my point being that when information is given to government agencies it should be realized that it is important and should be correct.

Now, I think that we are entitled to know. I may not be, but that is our thought, and I ask the question, Are we not entitled to know who gave this information to the Board? It shouldn't be privileged because it is set forth in their complaint. If it is the Union, which I assume it is, I would like

to know how they can testify here one thing and then give certain information of another.

Is that error that the greasers are in here, or is it based upon information given to the Board?

Mr. Royster: It happens that I am not at all adverse to giving Mr. Callister that information. I do not believe he is entitled to it, I do not believe he is entitled to go behind the complaint and divulge these reasons other than by examination of witnesses, why certain allegations may appear in the complaint. As a matter of fact, the complaint may make [221] any number of allegations which the Board may fail to substantiate.

Trial Examiner Myers: Do you want to give him the information?

Mr. Royster: I would be glad to.

Trial Examiner Myers: On or off the record?

Mr. Callister: On the record.

Mr. Royster: I talked first to Mr. McKay, Business Representative of the International Association of Machinists.

Mr. Callister: Who has testified in this hearing?

Mr. Royster: That is right, and he supplied me with certain designations which are in evidence as Board's Exhibit 2(a) through (k), I believe. Then Mr. Callister, you furnished our office with a payroll, with several payrolls. I took these designations and compared them with the payrolls, and finding that some of the designations were from greasers, I assumed that the Union contemplated including greasers in its appropriate unit, and when I drew the complaint I so phrased it.

Mr. Callister: Well, then, you have never had a discussion with any of the Business Representatives of the Machinists in which they contended they represented the greasers?

Mr. Royster: Well, now, that is a little bit difficult to answer. They have told me that they do represent greasers. [222] They admit them to membership and do represent them for purposes of collective bargaining.

Mr. Callister: And did in this case?

Mr. Royster: Well, they haven't represented anyone for purposes of collective bargaining.

Mr. Callister: They attempted to, of course.

Mr. Royster: The testimony in the record shows that.

Mr. Callister: That is all I want.

Mr. Royster: It shows that they did.

After the drawing of the complaint, I talked to Mr. Apperson, Grand Lodge Representative of the Internation Association of Machinists, and he told me that he did not understand that greasers should be included in the unit.

Mr. Callister: What is Mr. Apperson?

Mr. Apperson: Grand Lodge Representative.

Mr. Callister: But you did not participate in negotiations at all, did you, Mr. Apperson?

Mr. Apperson: No.

Mr. Callister: That is all I have, Mr. Examiner. I thank you, and I thank Mr. Royster for that information.

Trial Examiner Myers: Have you any other witnesses you wish to call?

Mr. Callister: I may have just one question further.

Mr. Wells, I just have two questions, if I may.

Trial Examiner Myers: Which Mr. Wells? [223]

Mr. Callister: Joe Wells.

Trial Examiner Myers: Off the record.

(Discussion off the record.)

Trial Examiner Myers: On the record.

Mr. Callister: We will forget all of it except one question, there is one thing I did not clear up in Mr. Wells' examination.

J. W. WELLS

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Callister) This is the same J. W. Wells who heretofore testified, is that correct?

A. Yes.

Q. Mr. Wells, who has complete charge or supervision of all labor relations in your organization of Wells, Inc? A. I do.

Q. Do you permit anyone to negotiate labor contracts without either you being present or your approval?

A. No, I do not.

Mr. Callister: That is all.

(Testimony of J. W. Wells.)

Mr. Royster: No questions at all.

Trial Examiner Myers: You are excused. Thank you.

(Witness excused.) [224]

Trial Examiner Myers: Have you any other witnesses?

Mr. Callister: I have none, Mr. Examiner.

Trial Examiner Myers: Mr. Apperson?

Mr. Apperson: No other witnesses.

Trial Examiner Myers: Mr. Royster?

Mr. Royster: No other witnesses, Mr. Examiner.

Trial Examiner Myers: Have you any other evidence you wish to submit, Mr. Callister?

Mr. Callister: No, I do not.

Trial Examiner Myers: Mr. Apperson, any other evidence you wish to submit?

Mr. Apperson: No, I have not.

Trial Examiner Myers: Mr. Royster?

Mr. Royster: No other evidence, Mr. Examiner.

Trial Examiner Myers: Very well, any motions, gentlemen?

Mr. Royster: I wish to move at this time, Mr. Examiner, to conform the pleadings to the proof in the matters of names, dates, places, and to variance in material matters.

Trial Examiner Myers: Any objection?

Mr. Callister: I may say this, Mr. Examiner, it is not specific, so indefinite, I don't know what he is referring to. I assume this is ordinarily done in these types of hearings. My point is I think it is so indefinite I think it is objectionable on the ground.

Trial Examiner Myers: It is just as Mr. Royster says, just to correct typographical errors.

Any objection?

Mr. Callister: No, and I imagine in order to be in the same situation I will make the same motion.

Trial Examiner Myers: He said for the pleadings. The motion is granted without objection.

Any other motions?

Mr. Royster: Mr. Examiner, I also move to strike from paragraph IV of the complaint the classification "greasers".

Trial Examiner Myers: Any objection?

Mr. Callister: Yes, there is, Mr. Examiner. I object to it on the ground that there is already proof that claim was made for greasers in this unit and that there is no basis or reason to strike out matters that now appear to not conform to their theory of the case.

Trial Examiner Myers: Well, I will deny the motion.

Any other motions, Mr. Royster?

Mr. Royster: No further motions, Mr. Examiner.

Trial Examiner Myers: Have you any motions.

Mr. Apperson?

Mr. Apperson: No motions, Mr. Examiner.

Trial Examiner Myers: Have you any motions, Mr. Callister?

Mr. Callister: No, I have not. Except this, Mr. Examiner, [226] whether it became a part of this pleading or not, and I will have to submit that to you for your decision, in view of what has transpired here—no, I withdraw that, because as I un-

derstand it you do not now—Mr. Royster, that is, the Board, does not contend that the Machinists claim greasers in the unit any more because we have stipulated the unit, so that takes care of what I had in mind.

That is all I have.

Trial Examiner Myers: Very well.

Will you proceed with your oral argument, Mr. Royster?

ORAL ARGUMENT ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

Mr. Royster: I will address myself first, Mr. Examiner, to the 8(5) aspect of this case. You will recall that the testimony of the Board's witnesses set forth a meeting on May 16, 1944, at Las Vegas or near Las Vegas, Nevada, with Mr. J. W. Wells, who has testified that he is in charge of labor relations for Wells, Inc. and that all labor agreements must either be negotiated by him or with his approval. At that time the Union represented to Mr. Wells that it represented a majority of the employees in the shop at Reno, Nevada and suggested that a contract be signed covering the employees and offered as a basis for discussion the contract which had just been signed covering the Las Vegas operation.

Now, the testimony of the Board's witnesses is that at that time there was no question by Mr. Wells that the [227] Union represented a majority of

those employees or the fact they were seeking to represent employees in an appropriate bargaining unit. Mr. Wells, did, however, not enter into an agreement with them at that time and the meeting closed with, I think the inference is permissible, with the general understanding that these negotiations would resume at a later date.

Now, Mr. McShane testified that during the ensuing months he made attempts to get in touch——

Trial Examiner Myers: Instead of reviewing the entire testimony, just confine yourself to what your contentions are.

Mr. Royster: All right.

The contention of the Board is that on May 16, 1944, the Union represented a majority of the employees of the Respondent in its Reno shop in an appropriate unit and that at that time there was in effect a refusal to bargain which has been borne out by the following events:

That Mr. Wells did not in good faith at that time intend to bargain with the majority representative of the employees in their appropriate unit in his Reno shop, and that at no time since that date has he evidenced a willingness so to do.

Now, there has been testimony which the Examiner will recall about the numerous attempts to have meetings. On [228] October 5, 1944, again the Board contends, and a check of the designations submitted under Board's Exhibit 2(a) through (k) against the appropriate payroll records will show that the Union did, on October 5, 1944, represent a majority of the employees in the Reno shop, and in

fact Mr. Wells, upon looking at these designations, said, "Hell! You've got everybody on there but me."

Now, again, the unit does not appear to have been in dispute. Mr. Wells said that he noticed on one of the designations the name of Falk and that Falk was a greaser. Now, it happens, and the payrolls will show, that Mr. Falk was not employed by Wells, Inc. at that time, his employment having ceased some time during the summer. Although Mr. Wells said that he was somewhat disturbed by the finding that the Union was signing up greasers, he did not confide to the Union that he thought perhaps they were exceeding their jurisdiction or that to attempt to bargain for the greasers might lead to a jurisdictional dispute with the Teamsters, but it does appear that he thereafter counseled with the Teamsters' representative here in Reno and even after that counseling he testified he is still unsure whether greasers come within the jurisdiction of the Machinists or the Teamsters.

The meeting of October 5th again resulted in no agreement. There was a discussion of wages. Mr. Wells objected, [229] according to the testimony of the Board witnesses, to establishing a classification of Diesel Machinist Specialist at the Wells shop. He objected to the overtime provisions in the proffered agreement and the meeting closed with an understanding or an agreement, according to Mr. McShane, that negotiations would be resumed in approximately ten days. Well, there was no meeting within ten days or thirty days, and the Union

called in a Conciliator. The testimony will be recalled that the Conciliator went to the Company's office and that he was unable to arrange a meeting at that time.

Finally, however, on December 22, 1944, the Conciliator and the representative of the Union and Mr. Joe Wells, Mr. Howard Wells, met in the office in Reno.

Mr. McShane testified that at the outset of the meeting, to my recollection, the question of the bargaining unit was raised and that Mr. McShane stated that the bargaining unit had not changed, that it was still the same unit that they claimed to represent in October and was to include all mechanics, mechanic helpers and apprentices in the engine shop, I suppose you might term it, and the body shop. It does not appear, according to the testimony of the Board's witnesses, that there was, during the early portion of this meeting, any question raised with respect to the representative status of the Union among the employees in the unit which [230] it claimed appropriate. However, as the meeting progressed, Mr. Howard Wells left and then Mr. Joe Wells left and were absent from the meeting for some considerable period of time. When they returned, one of them announced, I have forgotten which one, that he had talked to some of the employees in the shop and that some of them did not want the Union to represent them and that therefore he thought there should be an election.

Now, Mr. Examiner, that is the first time that the Company raised the question of majority, since

it had been shown the designations on October 5th, and I submit that it was too late for the Respondent then to claim that the Union did not represent a majority, because prior to that time it had entered into negotiations concerning wages, hours and working conditions which had for their natural result the signing of a collective bargaining agreement.

The interrogation of the employees by the Wells Brothers, which one of them I have forgotten, is of course a violation of Section 8(1) of the Act. The Employees have the right to be free from any interrogation under Section 8(1) or restraint or coercion.

Now, also during this meeting of December 22nd, there was discussion of Jack Benton, or the testimony is that the Respondent attributed the union membership in the shop to the activities of Jack Benton. There is no testimony but that Jack [231] Benton was an efficient employee, and I submit the fact that he received periodic and substantial wage increases as persuasive of the conclusion that he was a good and valuable employee. He did make the mistake, however, of wearing a union button around the shop; he did make the mistake in a conversation with Bob Wells of sticking up for unions; he further made the mistake of protesting the exclusion of McKay from the shop when a representative of the Teamsters, according to Benton's testimony, was permitted free access. And so, without warning, on the 31st of January, 1945, he found himself separated from the payroll.

Now, I have touched just the high spots in the

evidence, Mr. Examiner, but I think it all adds up to three conclusions:

1. That the Respondent has interfered with, restrained and coerced its employees in the exercise of their rights under Section 7 of the Act;

2. That it discharged Jack Benton because of his union membership and activity on behalf of the Union; and

3. That it has refused and does now refuse to bargain with the majority representative of its employees in an appropriate bargaining unit.

Trial Examiner Myers: Mr. Callister.

ORAL ARGUMENT ON BEHALF OF THE RESPONDENT

Mr. Callister: Mr. Examiner, Mr. Royster, and Mr. Apperson, I think that the Board here has, the last two days, [232] by the introduction of certain documents as exhibits, definitely shown a situation different from what their witnesses have attempted here to testify to and certainly it has gone against the Board's contention. For illustration, they contend that on May 16th that when they completed the Wells Cargo contract that Mr. Wells agreed upon certain provisions of the contract, and yet the Union, by their exhibit of a letter dated August 8th, 1944, states that "We will submit proof to you of our representation."

Now, I have been in the labor practice for the past ten years and it is common knowledge that gentlemen who have represented the union and who

have testified here are experts in their business; they know all the angles; they know more than the average employer about labor relations in the way of negotiating contracts, and I cannot believe that any labor organizer or representative is going to take the position that after he starts negotiating a contract he is going to submit proof that he represents them. That is not done.

Now, we come to the meetings subsequent to the August time in which we have the Union getting these authorizations. Now, the Government has contended that a unit was described on May 16th and at subsequent times, and yet all through this proceeding, all through this period of time from May 16 to past December of 1944, we had this Union, the Machinists still getting greasers, tiremen, even shovel operators in [233] their Union as representing them as a unit. They would not get these individuals to have the Machinists represent them if they did not have in mind that they were going to be a part of the unit. That is not done.

Now, it is inconceivable to me that any reasonable group of men can contend that there has been a unit agreed upon previously to yesterday morning, in view of the documents here introduced. I call your attention to that exhibit Respondent's 1, which shows the date of December 18th, where the Union, the Machinists, sends another petition out in which they are designated the bargaining agency. Never in my experience, and I have negotiated many contracts, have I ever seen a situation where a union is contending that I have entered into an agreement

or recognized them and then gone out and got a petition. That isn't done. Particularly is it not done in getting individuals different from the unit which they have contended they have already agreed upon. That is not sense in my judgment, and I think that the documents, Mr. Examiner, here definitely prove a contention opposite from what the Government is now proceeding to attempt to have this Examiner rely upon.

Now, we even have an authorization from Mr. Jansen, who testified here as a greaser, was a greaser on December 25th. Certainly that is evidence enough that a unit had never been agreed upon because Mr. Wells definitely testified [234] and there is no contradiction in the evidence here, he did never recognize anybody for greasers and they attempted to put greasers and other units in there.

Now, we know this, Mr. Examiner: that the Teamsters, and it is common knowledge, ordinarily takes in greasers, washers, tiremen and so forth. Mr. Wells knew that it was in his contract at Luning. He knew Teamsters claimed that. It is only natural, he did the natural thing in finding out if the Teamsters were going to claim the greasers and helpers. He didn't want a jurisdictional dispute. That is what he was trying to avoid because he knew immediately after talking to Mr. Anderson if he had gone ahead and recognized the Machinists for the greasers he was in trouble. Mr. Anderson was here at this hearing yesterday and I am con-

vinced had the situation not been as it was, he would have come in here and protested.

Trial Examiner Myers: Well, at that meeting of December 22nd, the Company had already entered into an agreement with the Teamsters covering the greasers, did they not, or just line drivers?

Mr. Callister: Just line drivers. That was a master contract, but the Luning contract shows that there were greasers. But the contract at Reno was only line drivers.

I would like to come to Mr. Benton's testimony and his situation, which ties into this other. I am convinced that [235] Mr. Benton who, in his job classification was not a part of this unit but which had been stipulated here was a foreman, who did hire, who did fire, and who without any question under the interpretations of this Act which we are confronted with today could bind the Company. I am further convinced, and I have so advised Wells, I think any lawyer would, that a foreman such as Mr. Benton, participating as he did in getting men to join a particular union, would create an unfair labor practice on the part of this company as far as the Teamsters are concerned. In other words, the Teamsters in my judgment have ample proof here today to file an unfair labor practice charge against this company because of the activities of Benton. How the Government can come in and say that we have discharged Mr. Benton because of union activities, showing that that is unfair labor practice, I cannot understand. As a matter of fact, I have advised every client I have

that their foremen should not participate for or against any union because they bind them, particularly if there is another union organizing or having anything to do with it. That is the case here.

Now, to have this company charged with an unfair labor practice because of Benton's activities in this case certainly is inconsistent in my judgment because we are absolutely liable and open, wide open, as against a charge by the Teamsters because there is no contradiction here that Mr. Benton [236] by his influence as a foreman, we know that if a foreman belongs to a union, has a right to hire and fire, he can influence the men either to join or not to join, and the minute he even expresses his opinion the men would be afraid of not being promoted or not being given the proper type of job will do what that foreman says, and I think there is evidence here that the Teamsters, if they wanted to file charges against us, could do so in a minute.

So, in summary, I may say this to you, Mr. Examiner: in view of what has taken place here there are only two conclusions to draw. I am not going into details under the evidence. Mr. Wells certainly never did agree to the unit. By the evidence of the Union's activities, they did not themselves. And secondly, Mr. Benton could never claim he has been wronged by this Company. As a matter of fact, I think the Company should be chastised and should be reprimanded for its negligence in not discharging him. If I had known about it, I certainly would have advised the Company to discharge any foreman who is for or against any labor

organization. He must be neutral because he is the Company's agent, and I think the Company did more than they should have done by keeping Mr. Benton on as long as they did. That is not the basis for the discharge. The fact remains Mr. Benton testified he did not want to be foreman any longer, I assume because he thought he couldn't participate in union activities. Certainly [237] they have a right to have him laid off if he does not want the job classification they desire him to have; they have a right to do what they please.

There is one other point I think we must reason from the facts here and that is this: in my ten years experience and particularly the last two years I have had contact with this type of situation. I am a member of the War Labor Board at Denver. I have contact with the Conciliation Division and it's fundamental that a Conciliator of the Department of Labor, when he comes into a controversy, if the union has been recognized, even though they have both agreed to one provision he immediately certifies it as a dispute. I have never seen it otherwise. In this case, and we further know that the War Labor Board will not determine jurisdictional disputes, that is why they are not certified to the War Labor Board where there is a question as to jurisdiction. We, as the War Labor Board, will not take jurisdiction of it because we cannot determine the unit, we cannot determine who has the right to represent them, we refer it back to this Board.

Now for that reason I am convinced that from

the activities of the Conciliator himself in not doing anything further with it, not certifying it to the War Labor Board, is prima facie evidence that he was convinced that no unit was agreed to, that no designation of a representative had been agreed to by the Company, because if it had been, if there had been a [238] representative here designated, if there was a dispute, then he was certainly negligent in not certifying it and I know Mr. Curtin and he does not do those things.

Trial Examiner Myers: It is undisputed that the Company did not recognize the Machinists here as the representative of anybody, is it not?

Mr. Callister: That is our position. We did not recognize them. My position is that had the company recognized them as a collective bargaining agency, if Mr. Curtin was convinced of that, he would have certified it without any question because I think that is prima facie evidence that if a Conciliator comes in, certainly he does that one thing. Now, knowing conciliators as I do, if you recall, I asked Mr. McShane I think it was if he had given Mr. Curtin, the Conciliator, the proposed contract that he had submitted to the Wells. No. Something unheard of. I have never seen a conciliator come into a meeting yet that he does not say "All right, what have you agreed upon? What is your proposal? What is it all about?" He didn't get that here.

Second, and then I am through, Mr. Examiner: never in my experience have I ever seen a labor organization claiming to represent the men without giving at some stage of the proceedings a contract

that fits the operation or fits the situation that they have in mind. In other words, the contract they claim to have proposed to Mr. Wells has Diesel Mechanic, [240] which has nothing to do with it, has nothing about bodybuilders, has nothing about the assistants to bodybuilders, so that I think there is only one conclusion to draw, Mr. Examiner, and that is as far as Wells, Inc. is concerned that they have never recognized the union because the unit was never agreed upon and certainly I do not see how you can bargain with a labor organization without first knowing the group you are bargaining for; and secondly, there has certainly been no unfair labor practices upon the part of this Company in respect to discrimination or disparaging a union and in respect to their contact toward Mr. Benton, because Mr. Benton certainly has put this company in a position where the Teamsters can lodge a charge with this Board against them because there is no question that Mr. Benton was actively participating.

Thank you. I appreciate your indulgence, Mr. Examiner, and your courtesy during this hearing. Thank you, Mr. Royster, for your gentlemanly conduct, and you, Mr. Apperson.

Trial Examiner Myers: Do you wish to say anything, Mr. Apperson?

Mr. Apperson: No, not at this time.

Trial Examiner Myers: Mr. Royster?

Mr. Royster: I would like to touch very briefly on one or two points. The first, Mr. Examiner, is this: that the fact that the Union secured desig-

nations from greasers, one [240] of which I believe Mr. Callister stated is dated on the 25th of December, 1944, is of no particular materiality here. It is true we get confused perhaps when we talk about bargaining units. Ordinarily in the parlance of the Board a bargaining unit is one which the Board can force an employer to bargain with respect to. Now, an unrepresented employee may not properly be included in a particular bargaining unit but that does not mean that he must refrain from designating a labor organization to represent him. Nor does it mean that the labor organization may not go to the employer and say, "See here, we represent this group of employees. True, they do not come within what might be termed an appropriate bargaining unit. True, we may not perhaps through the offices of the National Labor Relations Board force them to bargain with us on behalf of these employees, but we represent them and we want to bargain for them."

Now, as to Jack Benton: the Respondent of course does not contend that Benton was discharged for his union activity, although the Board does. The point there is as I understand it, this:

A supervisory employee of course binds the company, but not in all circumstances. The Board has found, and I believe will continue to find that isolated union activity on the part of a supervisor which is contrary to the established policy of the company, of which the employees have full knowledge, is [241] not such conduct as is attributable to the employer.

Now, there is a case which bears very closely to that point, Houston Shipbuilding Case, published in volume 56 of our Reports. I am sorry I do not know the case number. Now, again, a supervisory employee is not barred by the Act in engaging in union activity per se. It is only when he carries with him in his union actions the force and the prestige and the power of the employer that such activity is frowned upon. In this situation, and by that I mean the Wells, Inc. case, the attitude of the Wells company toward the International Association of Machinists was well known, I believe the testimony will show that it opposed the Machinists in its bargaining efforts, that slighting remarks were made to Benton at least about the fact that he wore a union button; the business agent was barred from the shop, so no employee would gather from the fact that Benton was a union member and Shop Steward that that met with the approval of the Company. Quite the contrary.

There is a case which is quite similar to this in that respect, the Muskegon Dock and Fuel Company case reported in volume 58, and again I do not know the case number and it is my recollection that the Soss Manufacturing case, which is a more celebrated decision, also holds to the same theory, that the supervisory employee may be discharged—if a supervisory employee under certain circumstances is discharged for engaging [242] in union activities, such discharge is in violation of Section 8(3) of the Act.

Mr. Callister: I may say in answer to that, when

a man has power, which Mr. Benton himself so testified, to discharge and hire without reference to the company and employees knew that and he actually had done that, certainly it cannot be said that he comes within, and I am familiar with the cases Mr. Royster cites, and there is no question as to his interpretation of the law in that respect—however, certainly I do not see how it can be said that Mr. Benton's case comes within that, because I am here to say definitely in my judgment that was this an unfair labor practice on the part of the Teamsters for the activities of Benton in trying to get these men to join the Machinists as against the Teamsters, I think without any question we would have an unfair labor charge sustained against us.

Trial Examiner Myers: What do you want me to do, make a finding in this case?

Mr. Callister: No, but I am arguing I do not see the Government can blow hot and cold. In other words, Mr. Benton without any question, as a supervisor or with the right to hire and fire, binds the company and I think as a matter of fact if the Company ever permits men of his job classification to participate they are opening themselves wide open, so I do not think they applied the cases you have. That is all I [243] have.

Trial Examiner Myers: Anybody else?

Mr. Royster: Nothing for the Board.

Trial Examiner Myers: Anything else you gentlemen want to take up with me before I declare the hearing closed?

Mr. Callister: I may have one question. Do you desire any briefs to assist you?

Trial Examiner Myers: That is up to you. Do you wish to file a brief?

Mr. Callister: I would like this reservation if I may, Mr. Examiner: I would like to have the time usually granted to Respondents to file, and in the event I do not, I will let you know within the next five days, whether I desire to or not, but I would like to have the customary time to do so.

Trial Examiner Myers: All right. Anybody else wish to file a brief?

Mr. Royster: The Board will not file a brief.

Mr. Callister: I may say this, Mr. Examiner, if I can be of assistance to the Board, I will think it over and if I can I will be glad to. I know how some briefs are treated on the Labor Board, many times we get them and they go in the waste basket, they are not necessary. I want to be of assistance, not just for the purpose of writing one.

Trial Examiner Myers: I can assure you I will be pleased to receive a brief and I will read it. [244]

Mr. Callister: I am referring to myself. I have received them many times myself and many times when we feel there is no necessity to get one, many times I have told them I did not want to get one, because I did not think it was necessary.

Trial Examiner Myers: The issues are pretty well defined here.

Anything else you gentlemen want to take up with me before I call the hearing closed?

Mr. Royster: Yes, Mr. Examiner, this comes at

an awkward place in the record, but I have overlooked——

Mr. Callister: (Interposing) Can I be of assistance in stipulation?

Mr. Royster: Yes. Board's Exhibit 4, yesterday I asked Mr. Callister if he would be prepared to tell me which, if any, of the employees listed on the payroll were terminated between December 15th and December 22nd and if there were any hirings during that period among the shop employees.

Mr. Callister: I obtained that information. I neglected to give it to you. I am sorry. There was only one employee whose designation changed, Mr. Jackomiet, who went into the Army prior to December 22, 1944.

Mr. Royster: Mr. Chairman, I have this stipulation to propose: It is hereby stipulated among counsel for the Respondent, representative of the Union and counsel for the Board that Board's Exhibit 4 is an accurate list of the employees [245] of Wells, Inc. as of December 22, 1944.

Mr. Callister: We will so stipulate.

Trial Examiner Myers: You, Mr. Royster?

Mr. Royster: I do so stipulate.

Trial Examiner Myers: You, Mr. Apperson?

Mr. Apperson: The Machinists so stipulate.

Trial Examiner Myers: Is there anything else to take up before I declare the hearing closed?

Since there is nothing further, I will declare the hearing closed.

(Whereupon, at 1:30 o'clock p.m., Saturday, August 25th, 1945, the hearing in the above-entitled matter was closed.) [246]

Before the
National Labor Relations Board
Case No. 20-C-1306

In the Matter of:

WELLS, INC.,

and

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS

Reno, Nevada
August 24, 25, 1945

BOARD EXHIBIT No. 2(a)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining agent, in all matters pertaining to wages and working conditions.

Date, 10-4, 1944.

/s/ E. J. STAATS

Witness:

/s/ MELVIN JAKOMIET

BOARD EXHIBIT No. 2(b)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining agent, in all matters pertaining

to wages and working conditions.

Date, October 4, 1944

/s/ RALPH MUDGE

Witness:

MELVIN JAKOMIET

BOARD EXHIBIT No. 2(c)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining agent, in all matters pertaining to wages and working conditions.

Date, Sept. 30, 1944.

/s/ FREEMOND L. REED

Witness:

/s/ GEO. E. McKAY

BOARD EXHIBIT No. 2(d)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining agent, in all matters pertaining to wages and working conditions.

Date, Aug. 10, 1944.

/s/ R. O. GAROUTTE

Witness:

/s/ GEO. E. McKAY

BOARD EXHIBIT No. 2(e)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining agent, in all matters pertaining to wages and working conditions.

Date, 6-3, 1944.

/s/ GEO. W. PALMER

Witness:

/s/ GEO E. McKAY

BOARD EXHIBIT No. 2(f)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining agent, in all matters pertaining to wages and working conditions.

Date, 6-3, 1944.

/s/ R. H. WILSON

Witness:

/s/ GEO. E. McKAY

BOARD EXHIBIT No. 2(g)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my

sole bargaining agent, in all matters pertaining to wages and working conditions.

Date, June 3, 1944.

/s/ E. S. CASINELLA

Witness:

GEO. E. McKAY

BOARD EXHIBIT No. 2(h)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining agent, in all matters pertaining to wages and working conditions.

Date, June 3, 1944.

/s/ RUDY ZAYAS

Witness:

/s/ GEO. E. McKAY

BOARD EXHIBIT No. 2(i)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining agent, in all matters pertaining to wages and working conditions.

Date, June 3, 1944.

/s/ MELVIN JAKOMIET

Witness:

/s/ GEO. E. McKAY

BOARD EXHIBIT No. 2(j)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining Agent, in all matters pertaining to wages and working conditions.

Date, June 3, 1944.

/s/ ORAN ELLIS

Witness:

/s/ GEO. E. McKAY

BOARD EXHIBIT No. 2(k)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining Agent, in all matters pertaining to wages and working conditions.

Date, June 3, 1944.

/c/ CHAS. HAVERLAND

Witness:

/s/ GEO. E. McKAY

[Endorsed]: Admitted Aug. 24, 1945.

BOARD EXHIBIT No. 3

Reno Shop employees on payroll
period ending May 15, 1944:

Name	Classification
O. A. Richer.....	Shop Sup't.
Jack Benton	Foreman
E. Cassinelli	Mechanic
O. O. Ellis	Mechanic
C. Haverland	Mechanic
G. W. Palmer	Mechanic
Ed Staats	Mechanic
H. Wilson	Mechanic
R. Zayas	Mechanic
T. D. Hudgens	Greaser
M. Jakomiet	Greaser
Geo. McKay	Greaser
R. Mudge	Greaser
S. A. Williams	Greaser
R. Reisbeck	Tireman

No changes in the personnel of this shop on May 16, 1944.

Reno Shop employees on payroll
period ending September 30, 1944:

Name	Classification
O. A. Richer	Shop Sup't.
Jack Benton	Foreman
E. Cassinelli	Mechanic
O. O. Ellis	Mechanic
C. Haverland	Mechanic

Name	Classification
R. O. Garoutte	Mechanic
C. M. McBride	Mechanic
F. L. Reed	Mechanic
Ed Staats	Mechanic
R. Wedel	Mechanic
H. Wilson	Mechanic
M. Jackomiet	Helper
D. Lambert	Greaser
R. Mudge	Greaser
R. J. Kelly	Greaser
R. Reisbeck	Tireman

No changes in the personnel of this shop during period of October 1st to October 5th, 1944.

(Received Aug. 20, 1945, N.L.B.)

(In Ev)

[Endorsed]: Admitted Aug. 24, 1945.

BOARD EXHIBIT No. 4

WELLS, INC.

Employees and Classifications—12/15/44

Reno Division

J. W. Wells	President
H. A. Wells	Vice President
R. C. Wells	Reno Manager
J. W. Hess	Secty-Treas.
O. A. Richer	Maint. Supt.
H. B. Divine	Shop Supt.
J. C. Benton	Shop Foreman

E. S. Casinella	Foreman
A. B. Gandrud	Foreman
G. W. Hollenbeck	Foreman
C. Haverland	Foreman
Ray Reisbeck	Foreman
C. F. Crews	Dispatcher
J. E. Hunt	Dispatcher
J. J. Jordan	Parts Man
W. E. Randolph	Ass't. Secty-Treas.
M. A. Lehman	Bookkeeper
J. D. Gammil	Payroll Clerk
R. L. Thomas	Billing Clerk
I. Wainwright	Stenographer
F. C. Wells	Safety & Ins.
Oran Ellis	Mechanic
C. H. McBride	Mechanic
Ralph Mudge	Mechanic
E. F. Staats	Mechanic
S. E. Tower	Mechanic
R. H. Wilson	Mechanic
Albert McFadden	Mech. Helper
D. A. Jensen	Greaser
H. C. McConnell	Greaser
W. J. Barrios	Driver
Harry Howell	Driver
R. E. Hamilton	Driver
F. B. Lewis	Driver
Harry Maas	Driver
D. J. Mattice	Driver
Frank Nevis	Driver
W. C. Patterson	Driver
F. J. Phillips	Driver

H. E. Retterer	Driver
Ed Sandberg	Driver
R. W. Selby	Driver
Jack Stokes	Driver
Ted Thomas	Driver
Joe Yturraspe	

Luning Division

O. J. Van Winkle	Supt.
C. Branscom	Foreman
W. F. Rose	Greaser
R. E. Doubles	Driver
Bruce M. Gould	Driver
J. A. Hofland	Driver
Geo. B. Jackson	Driver
Geo. O. Wheatley	Driver
Joe Williams	Driver

Elko Division

H. C. Anderson	Supt.
H. C. Millard	Foreman
M. C. Wignall	Foreman
Edna Morris	Clerk
Fred Walker	Greaser
R. O. Lee	Greaser
Geo. Bennett	Driver
Ralph Drown	Driver
Joe Hethcock	Driver
George Lostra	Driver
O. F. Romine	Driver
H. H. Stevenson	Driver

[Endorsed]: Admitted Aug. 24, 1945.

BOARD EXHIBIT No. 5

Reno, Nevada

August 8, 1944

Subj: Labor Agreement

Mr. Joe Wells
Wells Cargo
Las Vegas, Nev.

Dear Sir:

This communication serves as notice that Lodge #801, International Association of Machinists, Reno, Nevada represents the Mechanics employed by you in both of your Reno shops, and hereby request that you meet with our Representatives for the purpose of negotiating an agreement between your Company and Lodge #801, covering the employees performing work coming under the jurisdiction of the International Association of Machinists.

All of the above-mentioned employees are represented by Lodge #801 and we will submit proof of this representation at the first meeting with you.

I was informed by Mr. Howard Wells, of your Company that you would not be in Reno for some time to come, but that your duties would require your presence in Las Vegas, and suggested that I contact you in regards to this matter, as you are the only one who has authority to decide matters of this kind.

I talked to some of your mechanics and it is my opinion that it will be to the best interests of all concerned to have this agreement signed as soon as possible.

In view of your inability to come to Reno, I will meet you in Las Vegas, at your earliest convenience, if you can meet me Monday or Tuesday of next week at Las Vegas, advise by mail, to T. E. McShane, 1115 Sierra St., Reno, Nevada, c/o Geo. E. McKay, Secretary Lodge #801, I.A. of M.

Yours truly,

T. E. McSHANE, G. L. R.

International Asso. of Ma-
chinists.

[Endorsed]: Admitted Aug. 24, 1945.

BOARD EXHIBIT No. 6

AGREEMENT

This agreement entered into this 15th day of May, 1944 by and between Wells Cargo, Inc. on their Defense Plant Corporation-Basic Magnesium Incorporated ore haul, party of the first part, hereinafter referred to as the company, and the Local Lodge #845, I. A. of M., Las Vegas, Nev., party of the second part, hereinafter referred to as the Union, Witnesseth:

It is hereby agreed that all of the provisions of this agreement, as described and contained in the following articles and sections thereof, shall be binding upon the parties signatory hereto, and shall be observed and enforced by both the company and the Union.

ARTICLE I.

Section A

The company recognizes the Union as the sole collective bargaining agency for all employees performing work which comes under the jurisdiction of the I. A. of M.

Section B—Machinists Jurisdiction

The Company recognizes the jurisdiction of the Machinists as that contained in the Constitution of the International Association of Machinists, effective April 1, 1942 between pages V and X, inclusive.

Section C—Union Membership

All employees covered by this agreement shall be members of Local #845, I. A. of M., Las Vegas, Nevada, and shall maintain their membership in said Local #845 during the life of this agreement.

Section D—New Employees

New employees shall be secured through the Union, if the Union is unable to furnish competent men within 96 hours, then the company may secure them from other sources, provided they obtain a work clearance from the Union before going to work and comply with Union membership requirements within fifteen (15) days after going to work.

ARTICLE II.

Section A—Company Rules

Company rules, if and when they affect employees covered by this agreement, shall be subject to the provisions of the agreement.

Section B—Nondiscrimination

The company agrees not to discriminate in any way against any employee for Union Activities, providing that such activities are in accordance with the Provisions of the Agreement.

ARTICLE III.

Section A—Report Time

Any employee ordered to report for work and who is not put to work shall be paid four (4) hours at the hourly rate in effect for the day in which the incident occurs. Any employee who is not notified by quitting time not to report for work on his regular shift shall be considered as being ordered to report for work.

Section B—Premium Pay

On any shift that starts between 6:00 a. m. and 8:00 a.m., whether it be the first or second shift, no premium will be paid and on the fourth shift a 15% premium will be paid over the wages shown in this agreement.

In the event this operation should be regulated to a three shift operation, no premium will be paid on the first shift, a 10% premium will be paid on the second, and a 15% premium will be paid on the third shift.

Section C—Lunch Period

All lunch periods shall be thirty (30) minutes on employees time.

ARTICLE IV.

Section A—Hours of Labor

Standard work day and week:

Five (5) eight (8) hour shifts shall constitute a regular work week. All time worked in excess of eight (8) hours in any one day shall be paid for at one and one half ($1\frac{1}{2}$) times the hourly rate. Time and one half ($1\frac{1}{2}$) times the regular hourly rate shall be paid for the sixth (6th) consecutive day. Double the regular hourly rate shall be paid for the seventh (7th) consecutive day of the regular work week.

Section B

Until the President of the United States of America shall proclaim that the national emergency no longer exists, the overtime provisions set up by the President's directive and interpreted by the Department of Labor shall apply.

Section C—Holidays

The following days shall be paid for at one and one half ($1\frac{1}{2}$) times the regular rate—New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

When any of the holidays named in this article fall on Sunday, then the day observed by the State or Federal Government shall be considered a holiday and paid for as such.

When holidays fall on employees' regular scheduled work day and are not worked at the request of the employer, the employee shall be paid for that

day at the regular straight time rate; but if the holiday falls on an employee's regular day off, the employee will not be paid for that day.

Section D—Vacation

Employees covered by this agreement, and who have been in the service of the Company for a period of one year, shall be given one week vacation with pay, at the employee's regular weekly rate.

For employees who have been in the service of the Company for a period of three years, they shall be given two weeks vacation with pay, at the employee's regular weekly rate.

At the end of each year's service, thereafter, the employees shall be given a vacation as defined above.

The time that vacation is to be taken shall be decided by the Company and the employee. Forty (40) weeks worked, in a twelve-month period, shall constitute a year's service within the meaning of the Article.

ARTICLE V.

Section A—Seniority

Seniority shall apply in all cases, when the senior employee is competent. The Company and the Union shall judge the competency of the employee. Any employee in company service for sixty (60) days shall be considered as having established his competency and given a seniority rating retroactive to his employment date.

Section B—Discharges

No employee shall be discharged or layed off for

any other than a justifiable cause. Any employee shall have the right to appeal his discharge or lay-off through the Grievance Procedure established by the Provision of the Agreement. All grievances must be presented by the employee in writing to Union and employer within five (5) days of discharge or lay-off. If reinstated, he shall be paid for all time lost by the reason of said discharge or lay-off.

In all cases of termination of service, whether it be discharge, lay-off, or resignation, the employee shall be given a copy of his termination of service slip, which shall state the reason for termination.

Section C—Dispute and Grievance

Any dispute or grievance affecting employees covered by this Agreement that cannot be settled by the Company and the representative of the Union within three (3) days shall be submitted to the conciliation service of the U. S. Department of Labor.

Section D—Armed Forces

As to the reemployment of employees of the Company inducted into the land or naval forces of the United States, as a result of the operation of the "Selective Training and Service Act of 1940" or the "National Guard and Reserve Officers' Mobilization Act", Public Act No. 783 and Public Resolution No. 96, Seventy-Sixth Congress, the Company will comply with Federal and State Laws relating there to. As to reemployment of any other employees who enter active service in the land or naval

forces of the United States by enlistment and as to whom no such Federal or State Laws have been enacted, the Company and the Union will use their best efforts to secure for such enlisted employees' advantages equal to those provided by law for employees inducted into such forces.

ARTICLE VI.

Section A

This agreement shall be binding on the Company, its successors or assignees, and the parties hereto.

ARTICLE VII.

Section A—Duration of Agreement

This agreement shall be in full force and effect for a period of one year from date of signing, and shall remain in effect from year to year thereafter, unless either party signatory to this Agreement serves notice upon the other party, in writing, thirty (30) days prior to the anniversary date, and such notice shall state the desired changes, whether it be to change or modify any section or sections thereof, or to terminate the Agreement. Negotiations shall start within ten (10) days of receipt of said notice. The Agreement shall remain in full force and effect during negotiations, and if the agreement is not renewed by the termination date, then the life of the agreement shall be extended for a period of thirty (30) days, and shall be in full force and effect during the said thirty days extension, and if agreement is not reached in this thirty (30) day extension period this agreement will terminate.

ARTICLE VIII.

(Minimum) Wage Schedule

Foreman shall be paid \$.125 (12½¢) per hour more than the highest wage rate under their supervision.

Machinist Diesel Specialist.....\$1.75 per hour

Mechanic's Assistant 1.25 per hour

Mechanic 1.50 per hour

Agreed to and signed this 16th day of May, 1944.

For the Company:

/s/ J. W. WELLS

For the Union:

/s/ GLEN O. ANDERSON,

Business Agent, Local #845.

/s/ T. E. McSHANE,

Grand Lodge Representative.

[Endorsed]: Admitted Aug. 24, 1945.

BOARD EXHIBIT No. 7

Western Union Telegraph Form

Oct. 30, 1944

Joe Wells

c/o Las Vegas Vulcanizing Shop

911 South Main St.

Las Vegas.

Important That You Meet Me Here at Once.
Wire When You Can Be Here.

T. E. McSHANE

Overland Hotel.

[Endorsed]: Admitted Aug. 24, 1945.

BOARD EXHIBIT No. 8

Western Union Telegraph Form

1944 Nov 1 PM 6 26

KHA361 NL PD-WUX Henderson Nev 1

T E McShane,
Overland Hotel Reno Nev.

You Promised at Least Ten Days Notice Before Meeting Impossible to Get Away for at Least Two Weeks Will Be in Inyokern Salt Lake City and Denver in the Meantime Will Contact You When Available.

J. W. WELLS.

[Endorsed]: Admitted Aug. 24, 1945.

RESPONDENT EXHIBIT No. 1

Auto Mechanic Local 801
International Association of Machinists
A. F. of L.
Reno, Nevada.

Dec. 18, 1944.

To Whom It May Concern:

We the undersigned, employees of Wells Inc. Reno, Nevada, do here-by authorize the International Association of Machinists A. F. of L. Local 801, known as the Machinists Union, to act as our

sole bargaining agent in all matters pertaining to wages and working conditions.

Signed by

/s/ CHAS. HAVERLAND

/s/ ORAN ELLIS

/s/ E. J. STAATS

/s/ RALPH MUDGE

/s/ D. A. JENSON

/s/ S. E. TOWER

/s/ M. McCLOUD

/s/ E. S. CASINELLA

/s/ R. H. WILSON

/s/ A. B. GANDRUD

/s/ Illegible

/s/ JAMES D. HARRISON

/s/ Illegible

/s/ C. H. McBRIDE

/s/ RAY REISBECK

/s/ JACK BENTON

(Received—Date Illegible—N. L. B.)

[Endorsed]: Admitted Aug. 24, 1945.

RESPONDENT'S EXHIBIT No. 2(a)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my

sole bargaining Agent, in all matters pertaining to wages and working conditions.

Date June 3, 1944.

/s/ RAY O. FALK

Witness:

/s/ GEO. E. McKAY

[Endorsed]: Admitted Aug. 25, 1945.

RESPONDENT'S EXHIBIT No. 2(b)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining Agent, in all matters pertaining to wages and working conditions.

Date June 3, 1944.

/s/ JACK BENTON

Witness:

/s/ GEO. E. McKAY

[Endorsed]: Admitted Aug. 25, 1945.

RESPONDENT'S EXHIBIT No. 2(c)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my

sole bargaining Agent, in all matters pertaining to wages and working conditions.

Date 6-3, 1944.

/s/ S. A. WILLIAMS

Witness:

/s/ GEO. E. McKAY

[Endorsed]: Admitted Aug. 25, 1945.

RESPONDENT'S EXHIBIT No. 2(d)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining Agent, in all matters pertaining to wages and working conditions.

Date 12-25, 1944.

/s/ O. A. JANSEN

Witness:

/s/ RALPH MUDGE

[Endorsed]: Admitted Aug. 25, 1945.

RESPONDENT'S EXHIBIT No. 2(e)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my

sole bargaining Agent, in all matters pertaining to wages and working conditions.

Date 10-4, 1944.

/s/ DEWEY A. LAMBERT

Witness:

/s/ MELVIN JAKOMIET

[Endorsed]: Admitted Aug. 25, 1945.

—

RESPONDENT'S EXHIBIT No. 2(f)

Authorization

I do hereby designate Local #801 International Association of Machinists, Reno, Nevada, as my sole bargaining Agent, in all matters pertaining to wages and working conditions.

Date 6/3, 1944.

/s/ O. A. RICHER

Witness:

/s/ GEO. E. McKAY

[Endorsed]: Admitted Aug. 25, 1945.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 11388

WELLS, INC., a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

PETITION FOR REVIEW

PETITION FOR REVIEW OF DECISION OF
NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now Wells, Inc., a corporation organized and existing under the laws of the State of Nevada, and files its petition, pursuant to the provisions of Section 10 of the Act of Congress, of July 5, 1935 (Ch. 372, 49 Stat. 453), known and cited as the National Labor Relations Act, for the review of the decision and order of the National Labor Relations Board entered at Washington, D. C., on June 12, 1946, ordering that petitioner cease and desist from certain practices denominated by said board as "unfair labor practices," reinstate one employee (foreman) with back wages, and respectfully shows to this court:

I.

JURISDICTION

That petitioner is a corporation organized and existing under the laws of the State of Nevada; that its principal office and place of business is in the city of Reno, State of Nevada.

That respondent, National Labor Relations Board, is an agency of the government of the United States of America, created pursuant to the Act of Congress of July 5, 1935 (Chapter 372, 49 Stat. 453) commonly known, referred to, and cited as the National Labor Relations Act; that said board has an office and a Regional Director at San Francisco, State of California, within the Ninth Circuit and within the jurisdiction of this court; that as well hereinafter more fully appear, the so-called unfair labor practices in which it is alleged in this proceeding that petitioner has been engaged, all occurred in Reno, State of Nevada, within the Ninth Circuit and within the jurisdiction of this court.

II.

STATEMENT OF PROCEEDINGS

(a) Filing of charges: That on the 9th day of August, 1945, the International Association of Machinists filed with the Regional Director of the National Labor Relations Board at San Francisco, California, charges to the effect that petitioner had engaged and was engaging in unfair labor practices within the meaning of said National Labor Rela-

tions Act at Reno, State of Nevada, contrary to said act.

(b) Complaint and its contents: That thereafter on the 9th day of August, 1945, the board issued its complaint against the petitioner in substance alleging:

That petitioner was a corporation with its principal office and place of business at Reno, State of Nevada. That it is a common carrier of freight by motor truck in the states of Nevada and California; that the Wells, Inc., a corporation, in the course and conduct of its business, transports and continuously has transported substantial amounts of freight from points in Nevada to points in California and from points in California to points in Nevada. That on the 31st day of January, 1945, the company terminated the employment of one Jack Benton solely because of his membership in and activities on behalf of the Union. Further, that the company has refused reinstatement of the said Jack Benton.

Said complaint further alleged that the company has interfered with, restrained and coerced its employees and did interfere with, restrain and coerce its employees in the exercise of their rights as guaranteed in Section 7 of the Act, and thereby is engaging in unfair labor practices within the meaning of Section 8, subdivision 1, of the Act. It is further alleged that the company refused to bargain, and has engaged in and is now engaging in unfair labor practices as defined in Section 8, sub-

division 5, of the Act. That by its discriminatory discharge of Jack Benton, that it was engaged in unfair labor charges within the meaning of Section 8, subdivision 3, of the Act.

(c) Answer and its contents: That thereafter on the 16th day of August, 1945, the petitioner filed its answer admitting that it was a corporation engaged in interstate commerce, but denying generally and specifically the allegations of the complaint charging the commission of unfair labor practices.

(d) Proceedings before the trial examiner: That thereafter a hearing was conducted before Howard Meyers, Esq., a trial examiner appointed by the board to hear said cause. That on or about the 17th day of October, 1945, the said Howard Meyers made and entered his Intermediate Report which he filed with the National Labor Relations Board.

(e) Order transferring case to National Labor Relations Board: That subsequent to the filing of said report the National Labor Relations Board made and entered its order transferring to and continuing said case before the Board.

(f) Filing objections and brief: That thereafter and on or about the 17th day of November, 1945, this petitioner filed its objections to the intermediate report, recommendations and findings of fact and conclusions of trial examiner. That petitioner also filed its written brief in support of its objections to the intermediate report, recommenda-

tions, findings of fact and conclusions of trial examiner.

(g) Order and decision of the board: That thereafter on the 12th day of June, 1946, the board entered its order and decision in the above entitled cause, containing findings of fact which were against the contentions of this petitioner on practically all of the material and controversial issues, which findings are not supported by nor based upon evidence in said cause; however, said decision and order was not unanimous, but one of the members thereof, the Honorable Gerard D. Reilly, entered his dissent, in which he stated he could not accept the conclusion of the majority that this petitioner discharged the said foreman, Benton, because of his desire to discourage union membership in the rank and file union employees. And further, that he could not accept the decision of the majority that this discharge was violating Section 8 (3) of this Act. That the majority of the Board made its conclusions of law which are contrary to the Act, and particularly in respect to the discharge of the foreman, Benton. That such conclusions are without legal basis in the record of said cause. The long established principle of imputing to the employer of responsibility for the acts and statements of supervisory employees cannot longer prevail if, as the majority opinion provides, foremen are free to engage in union activities in behalf of a rank and file union. The majority of the board by directing the reinstatement of Benton adopts the principle that an employer cannot discharge a foreman be-

cause of his activities in organizing a union among the rank and file of the employees. This principle is not in accordance with the National Labor Relations Act. It is essential for the preservation of employees' freedom in joining labor organizations or selecting the bargaining representatives of their choice that they not be interfered with in this right by a supervisor or foreman of the management.

That said decision in effect found petitioner guilty of the unfair labor practices charged in the complaint; it in effect required petitioner to cease and desist from said so-called unfair labor practices, and requiring petitioner to reinstate the said Benton with back pay; it further required this petitioner to post notices in conspicuous places, stating that in effect it would cease and desist from unfair labor practices; further, to notify the office of the Regional Director of the National Labor Relations Board at San Francisco, California, as to what steps petitioner has taken to comply with said order.

This petitioner has notified the office of the Regional Director of the National Labor Relations Board of San Francisco, California by telephone as well as letter that it is filing with this court a petition for review.

That a true copy of said petition and order is attached hereto and marked Exhibit "A", and made a part of this petition.

(h) Petitioner's reasons for noncompliance:

That the office of the Regional Director of the National Labor Relations Act has been advised of the petitioner's reasons for noncompliance with the order as hereinafter set forth:

1. The board's findings of fact as to unfair labor practices are not supported by adequate or substantial evidence and the evidence affords no reasonable basis therefor.

2. That the discharge of Benton was not in violation of Section 8 (3) of the National Labor Relations Act or any provision of said act.

3. That there is no evidence to support the findings that Benton's discharge was to discourage membership in the rank and file union. That the foreman, Benton, had the right and power to hire and discharge, which power he exercised, and, therefore, any activity on the part of Benton on behalf of the rank and file union is proscribed by the act. Therefore, the petitioner had a right to discharge said Benton. The petitioner was under an affirmative duty to terminate coercive activity of its representative interfering with its employees' freedom of self organization.

III.

ASSIGNMENTS OF ERROR

Petitioner, as a basis for review, makes the following assignments of error, to-wit:

(1) That the petitioner, by the discharge of the

foreman, Benton, discouraged membership in the rank and file of the union in violation of Section 8 (3) of the act.

(2) The finding that the petitioner discriminated as to the hire and tenure of foreman, Benton's, employment thereby discouraging membership in the rank and file of the union employees.

(3) The finding that the petitioner interfered with, restrained and coerced its employees in violation of the rights guaranteed in Section 7 of the act, and further, that the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8-1 of the act.

IV.

PRAYER.

Wherefore, petitioner petitions this court for a review of the decisions, findings and order of the National Labor Relations Board dated June 12, 1946, and prays:

(1) That a copy of this petition and of the process of this court be served upon the respondent, National Labor Relations Board, as provided by Section 11-5 of the National Labor Relations Act.

(2) That the National Labor Relations Board be directed and required by an appropriate order of this court, forthwith, to certify and file with this court, pursuant to Section 10 (f) of the National Labor Relations Act, a transcript of the

entire record in the proceedings, including therein the trial examiner's report and findings upon the facts, including all exhibits and the originals of all papers filed with the board from which the complaint was formulated and issued.

(3) That this petition for review be preferred and heard and determined expeditiously, as provided in Section 11 (i) of the National Labor Relations Act.

(4) That the said decision, findings and order, and the mandatory and injunctive requirements and provisions thereof as to the petitioner be each and in all respects annulled, vacated, and set aside.

(5) That the National Labor Relations Board be ordered and directed to dismiss the complaint and proceedings.

(6) That the petitioner shall have such other and further relief as may be just and proper in the premises.

Dated this 18th day of July, 1946.

WELLS, INC.

By LOUIS H. CALLISTER,
Attorney.

State of Nevada

County of Washoe—ss:

Howard A. Wells, being first duly sworn on oath, deposes and says: That he is the Vice President of Wells, Inc., the petitioner herein named, and as such makes this verification; that he has read the foregoing petition, knows the contents thereof, and

the same is true of his own knowledge except as to matters therein alleged on information and belief, and as to such matters he believes them to be true.

/s/ HOWARD A. WELLS.

Subscribed and sworn to before me this 17th day of July, 1946.

(Seal) /s/ MARGARET A. LEHMAN,
Notary Public residing at Reno, Nevada. My
Commission Expires: July 31, 1948.

[Endorsed]: Filed July 18, 1946.

[Title of Circuit Court of Appeals and Cause.]

POINTS RELIED UPON IN SUPPORT OF
PETITION FOR REVIEW

1. That the National Labor Relations Board erred in finding that the petitioner, by the discharge of the foreman, Benton, discouraged membership in the rank and file of the union in violation of Section 8 (3) of the National Labor Relations Act.

2. That the National Labor Relations Board erred in finding that the petitioner discriminated as to the hire and tenure of Foreman Benton's employment, which thereby discouraged membership in the rank and file of the union employees.

3. That it erred in directing this petitioner to offer Jack Benton immediate and full reinstatement to his former or a substantially equivalent

position without prejudice to his seniority or other rights and privileges.

4. That the National Labor Relations Board erred in directing the petitioner to make whole Jack Benton for any loss of earnings he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during such period.

5. That the National Labor Relations Board erred in finding that the petitioner interfered with, restrained and coerced its employees and did certain acts in violation of the rights guaranteed in Section 7 of the National Labor Relations Act.

6. That the National Labor Relations Board erred in finding that the respondent had engaged and is engaging in unfair labor practices within the meaning of Section 8, paragraph one, of the National Labor Relations Act.

7. That the National Labor Relations Act hereinabove referred to is the act of July 5, 1935, C. 372; 49 Stat. 449; 29 USCA, paragraph 151-166.

Dated this 27th day of September, 1946.

WELLS, INC.,
By LOUIS H. CALLISTER,
Attorney.

[Endorsed]: Filed Sept. 30, 1946.

[Title of Circuit Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION FOR REVIEW OF ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, and, pursuant to the National Labor Relations Act (49 Stat. 449, U.S.C. Supp. V, Title 29, Sec. 151, et seq.), herein called the Act, files its answer to the petition to review and set aside a Decision and Order issued by the Board against Wells, Inc., Renó, Nevada, petitioner herein, and its request for enforcement of said Decision and Order.

1. The Board admits the allegations contained in paragraph I of the petition for review.

2. Answering the allegations contained in subparagraphs (a) to (f), inclusive, of paragraph II of the petition for review, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter.

3. Answering the allegations contained in subparagraph (g) of paragraph II of the petition for review, the Board prays reference to the certified transcript of the record, filed herein, of the proceed-

ings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter. And further answering the allegations contained in subparagraph (g) of paragraph II of the petition for review, the Board denies each and every allegation of error contained therein.

4. The Board denies each and every allegation of error contained in subparagraph (h) of paragraph II and in paragraph III of the petition for review, and each and every subparagraph thereof.

5. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper under the Act.

Wherefore, having answered each and every allegation contained in the petition for review, the Board requests this Court to deny petitioner's prayer that the Decision and Order of the Board be set aside.

Further answering, the Board, pursuant to Section 10 (e) of the National Labor Relations Act, respectfully requests this honorable Court for enforcement of its order issued against petitioner on June 12, 1946, in the proceeding designated on the records of the Board as Case No. 20-C-1306, entitled: "In the Matter of Wells, Inc., and International Association of Machinists."

6. In support of this request for enforcement of its order, the Board respectfully shows:

(a) Wells, Inc., a Nevada corporation, engaged in business within this judicial circuit. This Court has jurisdiction of the petition for review herein and of this request for enforcement by virtue of Section 10 (e) and (f) of the Act;

(b) Upon proceedings had in said matter, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, and including a complaint, answer, hearing for the purpose of taking testimony and receiving other evidence, Trial Examiner's report and exceptions filed thereto, and briefs filed in support thereof, the Board, on June 12, 1946, duly stated its findings of fact and conclusions of law and issued its order directed to petitioner and its officers, agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Wells, Inc., Reno, Nevada, and its officers, agents, or successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, or any other labor organ-

ization, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment;

(b) Threatening employees with economic reprisal because of their activities on behalf of the above-named or any other labor organization;

(c) Interrogating employees concerning their membership or other activities in or on behalf of the above-named or any other labor organization;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Jack Benton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges;

(b) Make whole Jack Benton for any loss of earnings he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount

he normally would have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during such period;

(c) Post at its plant at Reno, Nevada, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(e) On June 12, 1946, the Board's Decision and Order was duly served upon the petitioner.

(d) Pursuant to Section 10 (c) and (f) of the Act, the Board has certified and filed with this Court a transcript of the entire record in the proceeding.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this answer and request for enforcement, and the filing of the certified transcript of the entire record in said pro-

ceeding, to be served upon petitioner, and that this Court take jurisdiction of the proceeding and of the questions to be determined therein, and make and enter upon the pleadings, evidence, and proceedings set forth in the entire certified record of said proceedings, and upon the order set forth hereinabove, a decree denying the petition to review and set aside and enforcing in whole said order of the Board, and requiring petitioner and its officers, agents, successors, and assigns to comply therewith. The Board further prays that this Honorable Court, in enforcing said order, shall provide that the aforementioned notice to be posted by petitioner, marked "Appendix A", shall specifically recite that the Board's order has been enforced by a decree of this Court so that the introductory clause of the notice shall read as follows: "Appendix A, Notice to all Employees, Pursuant to a Decision and Order of the National Labor Relations Board, as enforced by a decree of the United States Circuit Court of Appeals, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that."

/s/ A. NORMAN SOMERS,

Assistant General Counsel,
National Labor Relations
Board.

Dated at Washington, D.C., this 6th day of September, 1946.

“APPENDIX A”

Notice to All Employees Pursuant to
a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not discourage membership in International Association of Machinists, or any other labor organization, by discharging or refusing to reinstate any of our employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

We will not threaten our employees with economic reprisal because of their activities on behalf of the above-named or any other labor organization.

We will not interrogate our employees concerning their membership or other activities in or on behalf of the above-named or any other labor organization.

We will offer to Jack Benton immediately and full reinstatement to his former or a substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed and make him whole for any loss of pay suffered as a result of the discrimination.

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist the above-named or any other labor organization, to

bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

All our employees are free to become or remain members of the International Association of Machinists, or any other labor organization.

WELLS, INC.,

.....

(Employer).

By

(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

District of Columbia—ss.

A. Norman Somers, being first duly sworn, states that he is Assistant General Counsel of the National Labor Relations Board, respondent and petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing answer and petition for enforcement and has knowledge of the contents there-

of; and that the statements made therein are true to the best of his knowledge, information and belief.

/s/ A. NORMAN SOMERS,
Assistant General Counsel.

Subscribed and sworn to before me this 6th day of September, 1946.

[Seal] /s/ KATHRYN B. HARRELL,
Notary Public, District of
Columbia.

My commission expires March 7, 1947.

[Endorsed]: Filed Sept. 10, 1946.

[Title of Circuit Court of Appeals and Cause.]

ANSWER AND REPLY TO PETITION FOR
REVIEW OF RESPONDENT'S ORDER
AND REQUEST FOR ENFORCEMENT OF
SAID ORDER

Comes now the petitioner in the above entitled action, Wells, Inc., and in answer to the National Labor Relations Board, respondent's, answer and petition for review of its order and request for enforcement of said order, admits, denies and alleges as follows:

1. That heretofore it has filed its petition in the above entitled cause, for a review of the decision of the National Labor Relations Board in respect to the order as set forth in said answer and petition of the respondent. That said petition is referred

to and expressly made a part of this answer and reply.

2. That said order of said National Labor Relations Board, the respondent herein, is not supported by adequate or substantial evidence, and that the evidence in said cause affords no reasonable basis therefor.

3. That there is no adequate or substantial evidence or any evidence whatsoever that affords a reasonable basis for the finding and order that the petitioner interfered with and restrained its employees in violation of the rights guaranteed in Section 7 of the National Labor Relations Act; and further, that the petitioner had engaged in and is engaging in unfair labor practices in the meaning of Section 8, and particularly paragraph one, of the National Labor Relations Act.

4. That the discharge of the said foreman, Benton, was not in violation of Section 8 (3) of the National Labor Relations Act. That the board is not entitled to enforcement of its orders for the reasons hereinabove stated.

5. This petitioner denies generally and specifically each and every allegation contained in paragraph five of respondent's answer.

6. Petitioner alleges that said order is invalid and without force or effect by reason of the fact that it is based upon findings which are not supported by evidence; that said order and finding in respect to the reinstatement of said Benton is in

violation of and contrary to the provisions of the National Labor Relations Act.

Wherefore, petitioner prays:

1. That the request for enforcement of said order by the National Labor Relations Board be denied.

2. That the said decision, findings and order, and the mandatory and injunctive requirements and provisions thereof as to the petitioner be each and in all respects annulled, vacated, and set aside.

3. That the National Labor Relations Board be ordered and directed to dismiss the complaint and proceedings.

4. That the petitioner shall have such other and further relief as may be just and proper in the premises.

Dated this 27th day of September, 1946.

WELLS, INC.,

By LOUIS H. CALLISTER,
Attorney.

State of Nevada,

County of—ss.

Howard A. Wells, being first duly sworn, states that he is vice president of Wells, Inc., petitioner herein, and that he is authorized to and does make this verification in behalf of said Wells, Inc.; that he has read the foregoing Answer and Reply and has knowledge of the contents thereof; and that the

statements made therein are true to the best of his knowledge, information and belief.

/s/ HOWARD A. WELLS, V. P.,

Subscribed and sworn to before me this 28th day of September, 1946.

[Seal] /s/ MARGARET A. LEHMAN,
Notary Public.

Residing in Reno, Nevada.

My commission expires July 31, 1948.

[Endorsed]: Filed Sept. 30, 1946.

[Title of Circuit Court of Appeals and Cause.]

BOARD'S COUNTER-DESIGNATION OF
RECORD.

Comes now the National Labor Relations Board, the petitioner herein, and, in conformity with the revised rules of this Court, heretofore adopted, designates the following additional portions of the record to be printed:

1. The following Board's Exhibits: 2A to K, inclusive (authorizations designating Local No. 801, International Association of Machinists as sole bargaining representative); 5 (Letter, dated August 8, 1944, addressed to Mr. Joe Wells); 7 (Telegram, dated October 30, 1944, addressed to Joe Wells).

2. The following Respondent's Exhibits: 1 (Petition, dated December 18, 1944, signed by certain employees, designating Local No. 801, International

Association of Machinists as their sole bargaining representative).

/s/ A. NORMAN SOMERS,
Assistant General Counsel National Labor Relations Board.

Dated at Washington, D. C., this day of October 1946.

[Endorsed]: Filed Oct. 8, 1946.

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S AMENDED DESIGNATION

Petitioner, Wells, Incorporated, hereby designates the portions of the transcript in the case before the National Labor Relations Board entitled: Wells, Incorporated and International Association of Machinists, Case No. 20-C-1306:

1. Proceedings beginning at Page 3 of the first transcript, which includes Pages 1 to 171 inclusive. This includes the testimony of the following named witnesses:

K. C. Apperson	Jack Benton (Recalled)
Jack Benton	C. H. McBride
George E. McKay	Jack Benton (Resumed)
Glen O. Anderson	H. B. Divine
T. E. McShane	H. B. Divine (Recalled)

2. Also to designate the second transcript which

includes Pages 173 to 246 inclusive, which includes the testimony of the following witnesses:

J. W. Wells

J. W. Wells

Jack Benton

together with the following:

Oral Argument on Behalf of the National Labor Relations Board

Oral Argument on Behalf of the Respondent

3. It is our purpose to designate the testimony and oral argument on behalf of the Board as well as on behalf of the Respondent in the two transcripts without any exception whatsoever.

Board's Exhibits:

B-1 (a) through 1 (c) B-6

B-3 B-8

B-4

Respondent's Exhibits:

R-1 R-2 (d)

R-2 (a) R-2 (e)

R-2 (b) R-2 (f)

R-2 (c)

4. Petitioner further designates the following to be included in the record:

a. Intermediate report dated the 7th day of October, 1945.

b. Exceptions of Respondent's (petitioner here) to intermediate report.

c. Decision and order of National Labor Relations Board dated June 12, 1946.

d. The petition for review, if the same is necessary for being included in transcript.

e. Answer of National Labor Relations Board dated September 6, 1946.

f. Petitioner's reply to answer and request for enforcement of the National Labor Relations Board.

[Endorsed]: Filed Oct. 2, 1946.

[Endorsed]: No. 11388. United States Circuit Court of Appeals for the Ninth Circuit. Wells, Inc., a Corporation, Petitioner, vs. National Labor Relations Board, Respondent, and National Labor Relations Board, Petitioner, vs. Wells, Inc., a Corporation, Respondent. Transcript of Record upon Petition for Review, and Petition to Enforce an Order of the National Labor Relations Board.

Filed September 10, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11388

WELLS, INC., a corporation, PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

AND

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

VS.

WELLS, INC., a corporation, RESPONDENT

BRIEF OF PETITIONER, WELLS, INC., A CORPORATION

LOUIS H. CALISTER
Attorney for Petitioner.

FEB 14 1947

PAUL P. O'BRIEN,
CLERK

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11388

WELLS, INC., a corporation, PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

AND

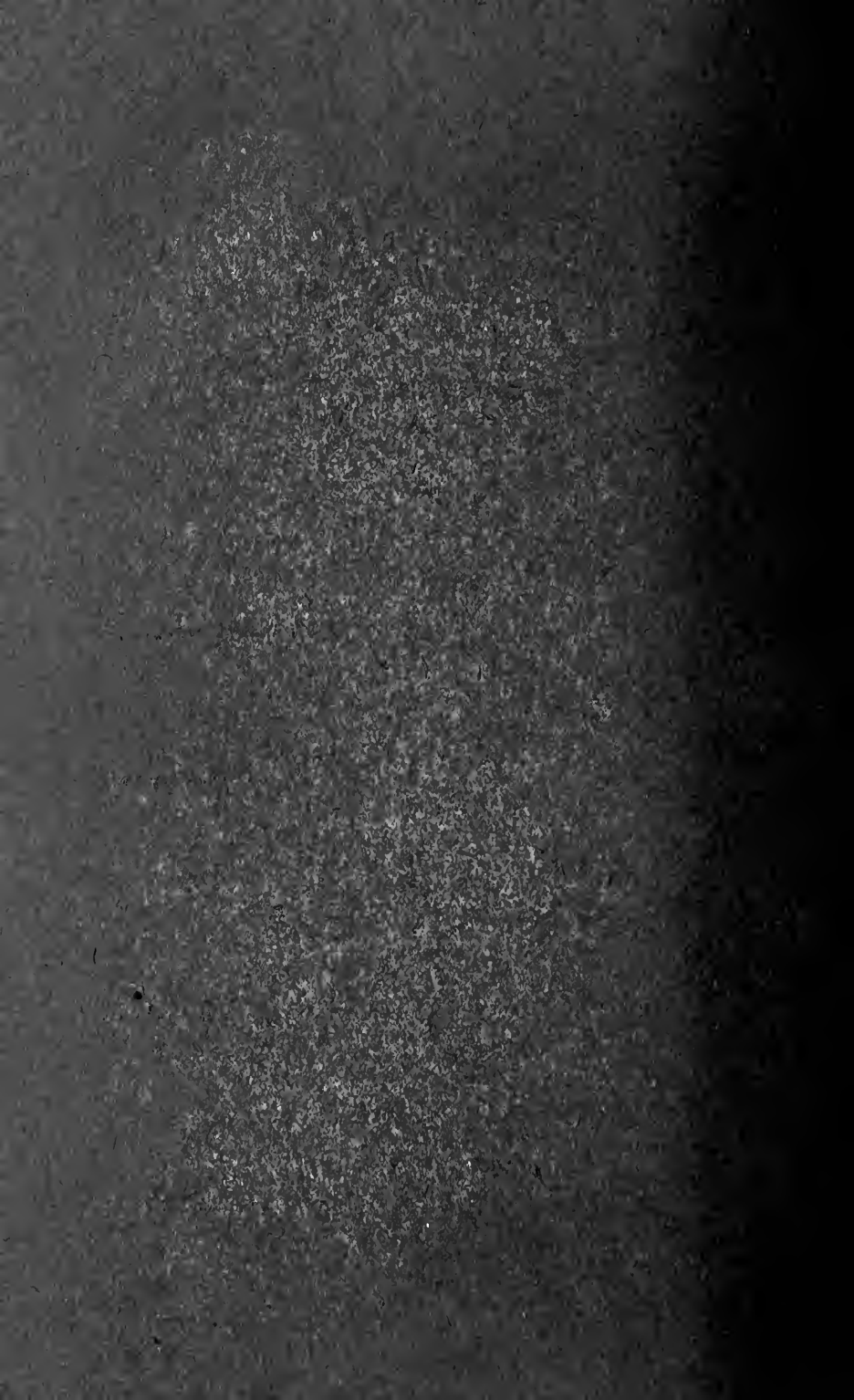
NATIONAL LABOR RELATIONS BOARD, PETITIONER,

VS.

WELLS, INC., a corporation, RESPONDENT

BRIEF OF PETITIONER, WELLS, INC., A CORPORATION

LOUIS H. CALLISTER
Attorney for Petitioner.



INDEX

	Page
Statement of the Case.....	1-10
Specifications of the Points Relied Upon.....	10-11
Argument	11-26

Points and Authorities:

I. Point

That the National Labor Relations Board erred in finding that the petitioner, by the discharge of the foregoing, Benton, discouraged membership in the rank and file of the union in violation of Section 8 (3) of the National Labor Relations Act.

II. Point

That the National Labor Relations Board erred in finding that the petitioner discriminated as to the hire and tenure of foreman, Benton's, employment, and thereby, by virtue of said discharge, discouraged membership in the rank and file of the union employees.

National Labor Relations Board v. Walt Disney Productions, Ninth Circuit, 146 Fed. (2d) 44, Cited.....	17
National Labor Relations Board v. Link-Belt Co., et al, 1941, 61 S. Ct. 358, 311 U. S. 584, 85 L. Ed. 368, 61 S. Ct. 31, 32, 311 U. S. 629, 85 L. Ed. 400, Cited.....	18
National Labor Relations Board v. Blue Bell Globe Manufacturing Company, 120 Fed. (2d) 974, Cited.....	18
National Labor Relations Board v. James Laughlin Steel Corporation, 301, U. S. 1, 57 S. Ct. 615, 628, 81 L. Ed. 893, 108 A. L.R. 1352, Cited	18

III. Point

That it erred in directing this petitioner to offer Jack Benton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.

IV. Point

That the National Labor Relations Board erred in directing the petitioner to make whole Jack Benton for any loss of earnings he may have suffered by reason of the petitioner's alleged discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the petitioner's offer of reinstatement, less his net earnings during such period.

National Labor Relations Board v. Union Pacific Stages, Ninth Circuit, 99 Fed. (2d) 153, Cited.....	20-23
---	-------

INDEX

	Page
National Labor Relations Board v. Continental Oil Company, 121 Fed. (2d) 120, Cited	20
Phelps-Dodge v. National Labor Relations Board, 61 S. Ct. 845, 849, L. Ed. 1271, also supra, Cited.....	20
Utah Copper Company v. National Labor Relations Board, 139 Fed. (2d) 788, Cited	19

V. Point

That the National Labor Relations Board erred in finding that the petitioner interfered with, restrained and coerced its employees and did certain acts in violation of the rights guaranteed in Section 7 of the National Labor Relations Act.

VI. Point

That the National Labor Relations Board erred in finding that the petitioner had engaged and is engaging in unfair labor practices within the meaning of Section 8, paragraph one, of the National Labor Relations Act.

Brown, Fact and Law in Judicial Review, 1943, 56 Harv. L. Rev. 899, Cited	24
Baltimore & Ohio R.R. Co. v. United States, 298, U. S. 349, 56 Sup. Ct. (1936), Cited	25
Crowell v. Benson, 285 U. S. 285 U. S. 22, 52, Sup. Ct. 285 (1932), Cited	25
Cf. United States v. Ju Toy, 198 U. S. 253, Sup. Ct. 644 (1905), Cited	25
Dickinson, Judicial Review of Administrative Determinations (1941) 25 Minn. L. Rev. 588-599, Cited	25-26
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 293; 61 Sup. Ct. 552, 555 (1941), Cited.....	26
Quoted	26
Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 49, 58 Sup. Ct. 459 (1938), Cited	26
McGovney, Administrative Decisions and Court Review (1941) 29 Calif. L. Rev. 110, Cited	26
National Labor Relations Board v. Pacific Gas & Electric Co., (Ninth Circuit) 118 Fed. (2d) 780, Cited.....	23
National Labor Relations Board v. Union Pacific Stages, 99 Fed. (2d) 153, supra, Cited	23
National Labor Relations Board v. Clarksberg Publishing Co., 120 Fed. (2d) 976, Cited	24
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 47, 57 Sup. Ct. 615, 629 (1935), Cited.....	26
Ohio Valley Water Co. v. Ben Avon Borough, 235 U. S. 287, 40 Sup. Ct. 527 (1920), Cited	25
St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 52, 56 Sup. Ct. 720, 726 (1936), Cited.....	25
Quoted	25
Thomas v. Collins, 65 Sup. Ct. 315, 330 (1945), Cited.....	24
Quoted	24
6 Wigmore, Evidence (3 ed. 1940), paragraphs 1772-1792, Cited....	25

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11388

WELLS, INC., a corporation, PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

AND

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

VS.

WELLS, INC., a corporation, RESPONDENT

BRIEF OF PETITIONER, WELLS, INC., A CORPORATION

STATEMENT OF THE CASE

This case is one to review the final order of the National Labor Relations Board dated the 12th day of June, 1946, in the case before the board, entitled "In the Matter of Wells, Inc. and International Association of Machinists," being the board's case No. 20-C-1306. The proceeding here sought to be reviewed was one instituted by the National Labor Relations Board against this petitioner, whereby petitioner was charged with having engaged in, and was engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, Section 8 (1), (3), and (5) and Section 2 (6) and (7), 49 Statute 449. The complaint was issued out of Twentieth Region on the 24th day of August, 1945, and a hearing was had before Trial Examiner, Howard Myers, at

Reno, Nevada on the 24th and 25th days of August, 1945. Examiner Myers rendered his Intermediate Report on the 17th day of October, 1945, to which this petitioner duly filed and served its exceptions. The board's decision and order was rendered and made on the 12th day of June, 1946 (tr. 21); however, Gerald D. Reilly, a board member, dissenting, in which he stated that he could not accept the conclusion of the majority of the board, that this petitioner had discharged their foreman, Benton, because of its (petitioner's) desire to discourage union membership and activities of its rank and file employees, and that the discharge was violative of Section 8 (3) of the National Labor Relations Act (tr. 32).

The decision and order of the board provided that this petitioner:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, or any other labor organization, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment;

(b) Threatening employees with economic reprisal because of their activities on behalf of the above-named or any other labor organization;

(c) Interrogating employees concerning their membership or other activities in or on behalf of the above-named or any other labor organization;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Jack Benton immediate and full reinstatement to his former or a substantially equivalent posi-

tion without prejudice to his seniority or other rights and privileges;

(b) Make whole Jack Benton for any loss of earnings he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during such period;

(d) Post at its plant at Reno, Nevada, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

It was ordered further that the complaint be dismissed insofar as it is alleged that the respondent refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in an appropriate unit (Tr. 29, 30 and 31). It will be noted that the board ordered that the complaint be dismissed insofar as it alleged that this petitioner had refused to bargain collectively with the union as the exclusive bargaining representative of its employees in an appropriate unit.

This petitioner, Wells, Inc., a corporation, filed its petition for review (Tr. 323) on the 18th day of July, 1946. The National Labor Relations Board filed its answer and petitioned for review of its order and requested enforcement of said order (Tr. 334) on the 10th day of September, 1946. Subsequent thereto, this petitioner filed its answer and reply to board's petition for order of enforcement. (Tr.

342) on the 30th day of September, 1946.

The so-called unfair labor practices in which it is alleged in the proceeding before the National Labor Relations Board, that petitioner had engaged, all occurred in Reno, State of Nevada, which is within the jurisdiction of this Honorable Court.

The facts out of which this controversy arose are as follows:

This petitioner is a Nevada corporation and is now, and has been during the period involved in this case, engaged in transportation of freight between the States of Nevada and California. That its principal office and place of business is at Reno, State of Nevada. The International Association of Machinists, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of this petitioner. The type of work at its Reno Shop was the complete repair work on its trucks and transportation, which included welding, greasing and servicing (Tr. 83 and 84).

Jack Benton, the person whom the Board provided in this order should be reinstated to his former position, was first employed by this petitioner on the 17th day of August, 1942, at its shop at Reno, Nevada. About the middle of April 1943, he was promoted to foreman (Tr. 82). It was stipulated by the Board and this petitioner that the foreman, Benton, had the right to hire and fire, that he actually did so; that he also supervised and directed the activities not only of mechanics, but that of grease men and tire men (Tr. 83). Foreman Benton was one of the most active members of the Union (Machinists). He was one of its trustees and the shop steward (shop steward duties consisted of taking care of trouble for the union with the management, Tr. 216. It was also his duty as shop steward to know which of the employees were and which were not members of the union, Tr. 213) at the shop of this respondent at Reno (Tr. 193). The foreman, Benton, also solicited members for the union in the shop among the employees of respondent (Tr. 216).

The complaint filed in this cause (Tr. 3, 4 and 5) by the board provided in paragraph four of said complaint, that the unit for the purposes of collective bargaining was

as follows:

“All mechanics, mechanic helpers and *greasers* employed by the respondent at its shop in Reno, Nevada, constitute a unit appropriate for the purposes of collective bargaining.” (Italics ours.)

At the trial it was stipulated that the unit would include only mechanics; this action excluded greasers from the unit. (Tr. 87.)

Exhibit I (Tr. 318) shows that the Union (Machinists) and foreman, Benton, solicited and obtained signatures of greasers, namely, D. A. Johnson and R. Mudge. Both Exhibit II (Tr. 304) and Exhibit IV (Tr. 307) show these two men to be greasers.

This petitioner had agreements at that time with other labor organizations not only as to its operation at Reno, but at its Luning, Nevada shops. Its contract with the Teamsters at Luning included grease men (Tr. 266). This company also had a contract with the Teamsters at Reno, covering line drivers (Tr. 258). The teamsters representative at Reno, Harry Andersen, told J. W. Wells, President of the petitioner, that the Teamsters Union had jurisdiction of grease monkeys (grease men), tire men and parts men (Tr. 238 and 239). Mr. Andersen further advised Mr. Wells (Tr. 239) that the men (washers, hostlers, tire men, greasers and parts men) belonged to him and that he would represent them; also, that the petitioner, Wells, Inc., would get into trouble if they negotiated with the Machinists with respect to these employees. Wells testified (Tr. 238) that he was afraid of a jurisdictional dispute in view of the fact that Andersen (Teamsters representative at Reno) and McShane (representative of Machinists) both claimed that they represented some of the same men, that is, greasers.

An affiliate of the petitioner, Wells Cargo, Inc., which had the same officers as this petitioner and who operated at Las Vegas, Nevada, had entered into an agreement with this same union, that is, the machinists; as a matter of fact, with the same officers who were representing the machinists in the controversy involved herein (Tr. 157). This contract was entered into on the 16th day of May, 1944 (Tr. 157). The contract at Las Vegas was entered into on the date of

the first meeting with Mr. Wells and the machinists, in which the Wells operation at Reno was discussed. He was at this time asked to negotiate for the Reno employees at this meeting, the date being May 16, 1944. A copy of the agreement entered into with Wells Cargo, Inc., an affiliate of this petitioner, is found in Tr. 310, known as Exhibit VI. This is a very favorable contract when viewed in the light of advantages to the union. For illustration, Section D of Article I, which is found in Tr. 311, provides that new employees shall be secured through the union. Then, if the union is unable to furnish competent men within 96 hours, the company may secure them from other sources, provided they obtain a work clearance from the union before going to work, and that they must then comply with the union requirements within fifteen (15) days after going to work. It further provided that any employee should have the right to appeal his discharge or lay-off through the Grievance Procedure.

Although Benton was shop steward, trustee of the union and assisted in securing members for the union among employees of this petitioner, he was expressly excluded from the unit for the purposes of collective bargaining both by the board and petitioner, for the reason that he was a foreman with the power to hire and fire (Tr. 191). The board stipulated with this petitioner that he should not be part of the unit for these reasons (Tr. 191). The evidence in this case clearly showed that his activities in matters of unionism were well known to this petitioner. The board so found (Tr. 25).

On January 31, 1945, Benton was discharged by this petitioner (Tr. 211).

The decision and order of the board (Tr. 21) does not set out all of the facts pertinent to the issues involved herein, and for that reason we have attempted to set out facts to fully acquaint this Honorable Court with the circumstances surrounding this controversy.

The Board found (Tr. 25) that this petitioner, through its officials, "prevented the union from collecting union dues in the shop during non-working time; questioned employees concerning their union membership and activities, made disparaging remarks concerning the union (of rank

and file employees); threatened to remove its operations to Salt Lake City rather than submit to any of the demands of the union in the proposed contract; and finally engaged in dilatory tactics during the collective bargaining negotiations."

We feel that in order to properly apprise this Honorable Court with the actual evidence with regard to the statement and findings of the board, we should set out verbatim the actual evidence with reference to these findings.

The evidence consists of certain conversations which we set forth hereafter.

One of the conversations had between the foreman, Benton, with Bob Wells, Reno Manager, at the Reno shop was in the month of September or October, 1944 (Tr. 206). Benton was asked if any one was present within hearing, and he answered, "No, I would say they were, but probably they never paid no attention." Bob Wells at that time asked him what was the yellow thing on his sweater. Bob Wells also stated, "Did a bird fly over you?" Benton replied, "No, it's a Union button, the men wear them." No further remarks were made at that time (Tr. 206). Apparently no one heard, or according to Benton, probably no one paid any attention.

Around December 1944, George McKay, one of the Union Machinists' representatives, came to the shop at Reno to collect dues. Bob Wells told him not to come into the shop and bother the men (Tr. 207).

Foreman Benton stated to Bob, "We are not working. He come in here to collect dues from the boys." Benton further said, "I don't see why he can't come in here any time he wants to collect dues. The Teamster boss comes in any time he wants to and talks for a long period of time." He was asked whether he observed, during his employment, other representatives of any other labor organizations come into the shop and talk to the men. He answered yes, that Mr. Andersen of the Teamsters did. He was asked whom he visited with when he came, and he stated that he visited with Reisbeck thirty-five or forty minutes at a time. (Reisbeck is a foreman as shown on the payroll of the company Tr. 307). Foreman Benton did not know whether or not

they (referring to the Teamsters' representative, Mr. Andersen and others) were ever asked to keep out of the premises. He stated he did not know. Benton further stated, "They used to come into the office into the shop (referring to Andersen). He further stated there were no objections to Andersen being in the office (Tr. 207-8)." It must be remembered that the Teamsters had a contract with the company at Luning, Nevada as well as Reno and, of course, would have a right to discuss business matters with the foremen as well as the management.

Some time in September or October, 1944, foreman Benton had a further conversation with Bob Wells at the shop at Reno (Tr. 204). He was asking who was present and he replied, "I don't know, the bunch eating dinner, Blackie Ellis." He also answered, "The day crew, Melvin Jakomiet." He was asked whether Bob Wells' remarks were audible to everyone in the group. Benton replied he supposed they were. He further stated that if the men wanted to hear they could have done so. He stated that they were talking of Unions and Bob Wells said Unions were lousy, that Unions would keep a good man down and promote a sorry man. He stated that they argued about it, but that it was not a heated argument. It was a friendly argument (Tr. 204). Further, Bob Wells stated he claimed that any time a company that was working men couldn't fire a man without being told by the Union what to do, then it was a hell of a place to work. He was asked whether he made any remarks, and Benton replied, "Well, sure, I stuck up for the Union." Benton stated that he remarked that he thought Union was a good thing if it was lived up to (Tr. 205). Benton further stated that he wore a Union button about sixty-five per cent of the time.

During the time of these conversations, Benton was foreman, with the power to hire, fire, direct and supervise the men. R. C. Wells was Reno Manager (Tr. 306).

It will be seen that all of these conversations were not with the men individually, but only concerned foreman, Jack Benton, and the Reno Manager, R. C. Wells.

The Board found (Tr. 25), as set forth herein, that this petitioner threatened to remove its operation to Salt

Lake City rather than to submit to any of the demands of the union. We must look at all of the conversation of McShane, and not just one statement. Nothing was said in front of employees. It is true (Tr. 169) that McShane stated that before he (Wells) would submit to any of the conditions that the union asked, he would move his operation to Salt Lake City; however; McShane further stated (Tr. 152) that when he presented the proposed contract to Joe Wells, he stated, "He (Wells) started at the first of the agreement, and paragraph after paragraph, as we went down he said, 'these are O.K.', until we came to the overtime provision." They further had a discussion in respect to overtime over eight hours. McShane further testified that in his conversation with Joe Wells that with reference to wages, that the wages paid in Las Vegas, which the union was asking, were prohibitive on this operation (referring to Reno). Wells stated that he could not pay the same wages at Reno that he was paying at Las Vegas (Tr. 146).

The Board further found that this petitioner engaged in dilatory tactics during collective bargaining negotiations (Tr. 25); however, it concluded that it could not agree with the finding of the Trial Examiner that the union represented a majority and, accordingly, must dismiss the allegation of the complaint that this petitioner violated Section 8 (5) of the Act. That is, it found that this petitioner had not committed an unfair labor practice in violation of Section 8 (5) by refusal to bargain with the union (Tr. 27).

The Board's further finding (Tr. 28) that the record in this case shows that at the time authorization cards were procured by the union, foreman Benton, who was in charge of the respondent's shop at Reno, with the authority to hire and discharge, was actively engaged in union activities as a steward and trustee, and influenced some of his subordinates to become members of the union. It found that since the unions majority was procured with the direct and open assistance of a supervisory employee (Jack Benton), it could not be said that the union represented the free and untrammelled will of the employees and hence cannot be recognized as the representative of the majority.

What constituted the appropriate unit was raised by the petitioner (Tr. 168). The union contended Benton was

a mechanic and that only some of his duties were of a supervisory nature and that he should be excluded from the union as this petitioner insisted.

Notwithstanding all these facts, the union at no time petitioned for certification as provided by the National Labor Relations Act.

The Board found that Wells, Inc., had engaged in dilatory tactics during collective bargaining negotiations (Tr. 25), and yet (Tr. 27) dismissed allegation of complaint that Wells, Inc. had violated Section 8 (5) of the Act. (Refusal to bargain in good faith).

SPECIFICATION OF THE POINTS RELIED UPON

The points on which petitioner intends to rely are the following:

(1) That the National Labor Relations Board erred in finding that the petitioner, by the discharge of the foreman, Benton, discouraged membership in the rank and file of the union in violation of Section 8 (3) of the National Labor Relations Act.

(2) That the National Labor Relations Board erred in finding that the petitioner discriminated as to the hire and tenure of Foreman Benton's employment, and thereby, by virtue of said discharge, discouraged membership in the rank and file of the union employees.

(3) That it erred in directing this petitioner to offer Jack Benton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.

(4) That the National Labor Relations Board erred in directing the petitioner to make whole Jack Benton for any loss of earnings he may have suffered by reason of the petitioner's alleged discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the petitioner's offer of reinstatement, less his net earning during such period.

(5) That the National Labor Relations Board erred in finding that the petitioner interfered with, restrained and

coerced its employees and did certain acts in violation of the rights guaranteed in Section 7 of the National Labor Relations Act.

(6) That the National Labor Relations Board erred in finding that the petitioner had engaged and is engaging in unfair labor practices within the meaning of Section 8, paragraph one, of the National Labor Relations Act.

The National Labor Relations Act hereinabove referred to is the act of July 5, 1935, C. 372; 49 Stat. 449; 29 USCA, paragraph 151-166.

ARGUMENT

I. Point

That the National Labor Relations Board erred in finding that the petitioner, by the discharge of the foreman, Benton, discouraged membership in the rank and file of the union in violation of Section 8 (3) of the National Labor Relations Act.

II. Point

That the National Labor Relations Board erred in finding that the petitioner discriminated as to the hire and tenure of foreman, Benton's, employment, and thereby, by virtue of said discharge, discouraged membership in the rank and file of the union employees.

We shall address our argument to the two points hereinabove set forth because they involve the same facts and circumstances.

It is the position of this petitioner that it cannot reasonably be inferred from the circumstances of the discharge of Foreman Benton that such discharge discouraged membership in the rank and file union.

It is further the position of this petitioner that it did not discriminate as to the hire and tenure of Foreman Benton's employment. Where an employer finds that an employee is engaged in activities prohibited by the National Labor Relations Act, thereby subjecting the employer to

violation of the provisions of the Act, it is the duty of the employer to immediately terminate such activities.

The petitioner, in respect to the discharge of Benton, found itself in the position of having one of its representatives of management, the trustee for the local union involved; the shop steward of the union, that is the representative of the union in its place of business, to look out for and represent the interests of the union; his further duties as shop steward being to determine which employees belonged to the union and those who did not. It further found itself with its representative (Benton) securing union members among the rank and file of the employees whom he supervised, discharged and employed. The Board found (Tr. 29) that the union's majority was procured with the direct and open assistance of Benton and, therefore, it could not be said that the union represented the free and untrammelled will of the employees and they, therefore, refused to recognize the union as representing the majority of the employees in the appropriate unit for the purposes of collective bargaining.

Therefore, there can be no question that Benton was doing things prohibited by the National Labor Relations Act. Further, the employer was cognizant of this situation.

Where an employer is bound to terminate such acts, can it be said that the law gives the Board the power and right to determine how such activities must be terminated?

Since Benton's activities constituted interference with the free choice of petitioner's employees, this petitioner was bound to terminate Benton's activities in behalf of the rank and file union in any manner it deemed appropriate, nor was there anything optional about this conduct. This petitioner was under an affirmative duty to terminate coercive activities of interference with its employees' freedom and self organization, and this is exactly what the petitioner did. Such being the case, the petitioner's motives for terminating Benton's unlawful activities become entirely irrelevant so long as the employer was doing only what the act commanded him to do, that is, to refrain from coercing his employees in the exercise of their right to self organization, either directly or through his agents, the acts and motivation for his conduct is beside the point.

It seems to us that when an employer is confronted with a similar set of circumstances and facts as in this case, regarding Benton's activities, that regardless of what he does or says, the Board could say that the discharge was to discourage membership in the union of its rank and file employees, such as the Board found in this case. If the employer told the foreman he was discharged because he was sponsoring and fostering a union among the rank and file employees, could this not be said to be a warning to all employees of the danger attached to adherence to the union? The Board in substance found in this case, (Tr. 26-27) that the discharge of Benton was a warning to all employees of the danger attached to adherence to the union and, therefore, discouraged union membership. If the finding of the Board in this case with respect to Benton's discharge is upheld, then it is going to be extremely difficult, if not impossible, for an employer to avoid violating the National Labor Relations Act in his actions in terminating the activities of a foreman engaged such as Benton.

If this board sustains the finding of the Board with respect to Benton, the petitioner must reinstate him to his former position, of foreman (managements representative). Supposing Benton, and it is very probable that he will, continues to carry on as he did prior to his discharge, what can this employer do? It is confronted with the fact that the Teamsters claim jurisdiction of certain of the men that Benton has recently helped organize into the Machinists Union. If it does not discharge Benton and if he continues his activities, it is subject to the filing of unfair labor charges by other unions. If it immediately discharges Benton, then it can be found again that the motive for the discharge was to discourage union activity and as a warning to other employees of the danger attached to adherence to the union. How can an employee act in a dual capacity, that is, management's and union's representative, such as the Board is requesting in this case? We call attention to this Honorable Court that the decision in this case by the Board was not unanimous. That Gerald D. Reilly, a Board Member, wrote a very strong dissent (Tr. 32).

That Benton's discharge was not intended to discourage membership in the rank and file Union appears

from the uncontroverted evidence showing that another foreman, who had authority to hire and discharge and who was a member of the same Union, was not discriminated against (Tr. 94, 116, 319, Exhibit 2 (f), Tr. 332, 234, 32).

Also, Benton's successor, at the time of his promotion to Benton's position, was a member of the same Union and his membership in the Union must have been known to the respondent (Tr. 128, 224, 32).

The petitioner's hostility towards the Union, as shown by anti-union statements of its officials, also cannot provide a reasonable basis for the inference drawn by the majority of the Board (Tr. 25). It was not so strong as to prevent them from entering into a collective bargaining agreement with the Union for the petitioner's Luning division (Tr. 266). The same officials entered into another collective bargaining agreement with the Union in behalf of one of the petitioner's affiliates, Wells Cargo (Tr. 157). The petitioner also operated its Reno division, which is involved in this proceeding, under a collective bargaining agreement with the Teamsters' Union covering its line drivers (Tr. 258).

Nor do we believe that the circumstance that Benton received no warning not to engage in his unlawful activities or that he was denied his request for demotion, or was not permitted to remain in his position at a normal salary, betrays an intent to discourage membership in the rank and file Union. What it might indicate is that the petitioner intended to discourage any activities in behalf of the rank and file Union by another foreman. But even assuming that indirectly Benton's discharge might have discouraged union membership and activities by removing from its rank its most active member and also by discouraging membership in the Union by foremen, it still does not follow that the respondent could not terminate Benton's activities by discharging him, for, as it will be shown, they were activities proscribed by the Act.

While the record does not support the conclusion of the majority of the Board that Foreman Benton's discharge was due to discriminatory reasons, it furnishes ample support for the conclusion that, under the circumstances

disclosed by the record, Benton's activities in behalf of the rank and file Union were activities proscribed by the Act, and that his discharge, therefore, was not violative of the Act.

Since April 1943, and until his discharge on January 31, 1945, Benton was employed by the petitioner as foreman in charge of its Reno shop (Tr. 82). As such foreman, Benton directed and assigned work of "every man . . . in the shop." At the hearing, the parties stipulated that Benton had authority to hire and discharge his subordinates (Tr. 83), that he had exercised that authority and excluded him from the bargaining unit. Of his union membership and activities the record discloses that Benton joined the Union in October 1943 and did not relinquish his membership in the Union upon his promotion to the position of foreman. At the time of his discharge, Benton was one of the trustees of the union local and the union shop steward. He openly wore his union button at work most of the time (Tr. 216). Benton also admitted that he talked to his subordinates about the Union and asked some of them to join the Union (Tr. 318), and that he didn't ask the other employees to join because they didn't have the money to join. Finally, Benton, was one of the first to sign the employees' petition of December 18, 1944, designating the Union as their bargaining representative (Tr. 319).

That Benton's activities in behalf of the rank and file Union are proscribed by the Act is clear. They had a tendency to coerce the rank and file employees under his supervision in the exercise of their rights to self-organization. As a management representative, Benton possessed a power to hire, promote, discharge, or alter the terms and conditions of their employment. Conscious of that power, these employees would normally be reluctant to refuse his suggestions to join the Union. Since Benton's activities constituted interference with the free choice of the petitioner's employees, the petitioner was bound to terminate Benton's activities in behalf of the rank and file union in any manner it deemed appropriate.

The Act imposes upon an employer a duty to refrain from interference in, or domination of labor organization of its employees, and the Board has since the beginning of

the enforcement of the Act, imputed to the employers the responsibility for acts violative of this duty committed by supervisors. Such a "company policy" the Board has therefore found to be inherent in every employer's labor policy, requiring no promulgation, publication or explanation.

It is for this reason that Foreman Benton must have presumed to know that his activities in behalf of the rank and file union were unlawful, jeopardized the neutrality of his employer and were in violation of his duties to the employer. No warning, therefore, was necessary to put Benton on notice that his conduct was both unlawful and disloyal to his employer.

Moreover, the petitioner could have terminated Benton's activities in behalf of the rank and file union by discharging him also because they compromised its neutrality. The record shows that there was a jurisdictional dispute between the Union and its rival, the Teamsters' Union, both of whom claimed jurisdiction over the petitioner's employees in certain classifications and that the petitioner was informed by a representative of the Teamsters' Union that the petitioner "will get into trouble if (it) negotiated with the Machinists . . . (in behalf of the disputed classifications)."

Since Benton has engaged in activities in behalf of the rank and file union in his capacity as a management representative, and since his activities were not protected by the Act, it would seem reasonable that the petitioner was at liberty to take any steps for the protection of its neutrality it alone deemed appropriate. It would seem that to scrutinize the employer's conduct for the purpose of finding out whether the measures taken upon the preservation of his neutrality were or were not "appropriate measures" would be unjustifiable and constitute an unwarranted encroachment upon the prerogative of the management.

The majority of the Board rejected the petitioner's explanation for Benton's discharge and imputed to the petitioner, a discriminative motive in discharging Benton. Counsel for the petitioner during the oral argument advised President Wells, before Benton's discharge, to remain in

its employ would have compromised its neutrality and caused it to be liable for unfair labor practices (Tr. 290).

We certainly cannot concede that it is the duty of the employer under all circumstances to disclose to the discharged employee the reason for his discharge.

Can it be said that an employer under all circumstances must disclose to the employee all the reasons for the discharge? We certainly think not.

Under broad implications of the decision reached by the majority of the Board, the principle of imputation to the employer of responsibility for the acts and statements of supervisory employees cannot longer prevail, if foremen are free to engage in activities in behalf of a rank and file union. By protecting the supervisory employees, who have authority to hire, discharge, and otherwise affect the tenure and conditions of employment, in their activities in behalf of the rank and file union, the majority of the Board has also impaired the basic principle, essential for the preservation of employees' freedom to join a labor organization or select their bargaining representative of their choice.

The Court held in the case of *National Labor Relations Board v. Walt Disney Productions*, 146 Fed. (9th Circuit) (2d) 44, in substance, that although the purpose and affect of a discriminatory discharge need not be shown by positive evidence, nevertheless there must be evidence upon which it could be reasonably inferred from the circumstances of the discharge that there was discouragement as to union membership.

There is no evidence whatsoever in this record from which it could be reasonably inferred, that the discharge of Benton in any way discouraged union membership or activities.

This petitioner, as an employer, committed an unfair labor practice by virtue of permitting Benton to continue as far as he did in helping the union procure a majority of the rank and file employees. The Board found that since the union majority was procured with the direct and open assistance of Benton, that it could not be said that the union represented the free and untrammelled will of the

employees, and hence, the union could not be recognized as representing the majority (Tr. 29). The Board disregarded and refused to accept the explanation of the discharge of the petitioner (Tr. 23).

There is no question that this company is responsible for the words or deed of Benton.

National Labor Relation Board v. Link-Belt Co., et al, 1941, 61 S. Ct. 358, 311 U. S. 584, 85 L. Ed. 368, 61 S. Ct. 31, 32, 311 U. S. 629, 85 L. Ed. 400.

It is well settled that the act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.

National Labor Relations Board v. Blue Bell Globe Manufacturing Company, 120 Fed. (2d) 974.

National Labor Relations Board v. James Laughlin Steel Corporation, 301 U. S. 1, 57 S. Ct. 615, 628, 81 L. Ed. 893, 108 A. L. R. 1352.

When a just ground of discharge appears, it is ordinarily a mere matter of speculation to say that the discharge was because of union membership, *supra*.

When an employer is bound by law to terminate activities of a representative of the management which are unlawful under the act, it would be a mere matter of speculation to say what the purpose was, and the effect of such discharge. The employer in this instance was duty bound to terminate such activities of Benton, and to attempt to determine what effect his discharge had would be pure speculation. If the law is otherwise, then any employer, when it is his duty to terminate the unlawful activities of its foreman is subject to having the Board find that the effect of such discharge discouraged union membership or activities.

III. Point

That it erred in directing this petitioner to offer Jack Benton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.

IV. Point

That the National Labor Relations Board erred in directing the petitioner to make whole Jack Benton for any loss of earnings he may have suffered by reason of the petitioner's alleged discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the petitioner's offer of reinstatement, less his net earnings during such period.

We shall address our argument to both points three and four because our argument is similar to both points.

The purpose of an order to offer reinstatement of a discharged employee is not only to restore the victim of reinstatement to the position from which he was unlawfully excluded, but also and more significantly to dissipate the deeply coercive effects upon other employees who may desire self organization, but have been discouraged therefrom by the threat to them implicit in the discrimination.

The evidence shows to the contrary. The Board found that the union majority was procured with the open and direct assistance of Benton, management's representative, and, therefore, it could not be said that the union represented the free and untrammelled will of the employees (Tr. 29).

This petitioner recognizes that the Board has the power to determine the manner in which unfair labor practices may be expunged; however, the manners elected to expunge such unfair labor practices must be reasonable and fairly adapted to the situation.

Utah Copper Company v. National Labor Relations Board, 139 Fed. (2d) 788.

It is the petitioner's further contention that the Board in its findings has disregarded the continued good faith activities of this company in its dealing with unions in the past. The records disclose the fact that it had entered into a contract by its affiliate, Wells Cargo, with this same union, that is the Machinists Union; that no difficulty was encountered regarding that contract or negotiations.

The fact that findings of the Board as to the facts if supported by evidence shall be conclusive, does not compel the Court to accept such findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.

National Labor Relations Board v. Union Pacific Stages, Ninth Circuit, 99 Fed. (2d) 153.

The National Labor Relations Board Act was not intended to empower the National Labor Relations Board to substitute its judgment for that of the employer in the conduct of its business; further, it did not deprive the employer of his right to select or dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation, *supra*.

It cannot be inferred from the evidence that any employee has been discouraged in union membership or activities.

The functions of the National Labor Relations Board are to secure the employees their rights under the National Labor Relations Board and remove effects of any unlawful conduct by an employer; and the act being remedial, the Board may take such affirmative action as will insure to employees their rights guaranteed by the Act.

National Labor Relations Board v. Continental Oil Company, 121 Fed. (2d) 120.

One of the purposes of the act is to stop abuses that interfere with the right of the employee of self organization.

Phelps-Dodge v. National Labor Relations Board, 61 S. Ct. 845, 849, 85 L. Ed. ;....., also *supra*.

A Board Order directing the reinstatement with back pay of an allegedly discriminatory discharge will not be enforced where the order is based on nothing more than speculation and conjecture, *supra*.

How could it be said that reinstatement of Jack Benton to his former position of management's representative under the circumstances in this case effectuates the policies of the National Labor Relations Act?

We are in substance asked to reinstate the trustee and shop steward of the union, who has subjected this company to a violation of the National Labor Relations Act by virtue of his conduct as found by the Board. As we have heretofore stated, the Board disregarded the union claim of majority because of the open assistance and help of Benton (management's representative).

We shudder to think of the untenable position in which this petitioner will find itself if it is compelled to reinstate Benton to his former position as management's representative. If he continued any of his former activities as shop steward and trustee of the union, and there are no assurances he won't, this petitioner would be powerless to terminate such activities without being subjected to a claim that the effect and purpose of terminating these unlawful activities was to discourage union membership and activities.

It cannot be said that to effectuate the policies of the National Labor Relations Act it is necessary to reinstate Jack Benton. It seems to us that the effect of such reinstatement would give the stamp of approval of Benton's activities in interfering with the free and untrammelled rights of the employees to belong to any labor organization which they may desire to choose.

If the petitioner is forced to reinstate Benton and he continues his unlawful activities, a jurisdictional dispute is almost certain to result. This petitioner would then find itself in the untenable position where it would be afraid to terminate the activities of Benton; and, therefore, by not terminating such activities, it would be subject to a finding of the Board that it is responsible for Benton's activities, as management's representative, and, therefore, subject to another charge of unfair labor practices.

V. Point

That the National Labor Relations Board erred in finding that the petitioner interfered with, restrained and coerced its employees and did certain acts in violation of the rights guaranteed in Section 7 of the National Labor Relations Act.

VI. Point

That the National Labor Relations Board erred in finding that the petitioner had engaged and is engaging in unfair labor practices within the meaning of Section 8, paragraph one, of the National Labor Relations Act.

We shall address ourselves to the two above named points because the facts surrounding the subject matter is the same.

The Board found: (Tr. 25)

“Through its officials, the petitioner prevented the union representative from collecting union dues in the shop during non-working time; questioned employees concerning their union membership and activities, made disparaging remarks concerning the Union in the presence of rank and file employees; threatened to remove its operations to Salt Lake City rather than to submit to any of the demands of the Union in the proposed contract; and finally, engaged in dilatory tactics during the collective bargaining negotiations.”

On pages 7-8-9 of this brief, we have set forth in detail the conversations which the Board relies upon in making some of its findings as hereinabove quoted.

It will be noted that in these conversations none of the rank and file employees participated. It is true that they may have overheard parts or all of the conversation. Benton was the principal actor in these conversations and was management's representative. As we have said before, the Board held that because of Benton's activities, the free and untrammelled will of the rank and file employees was interfered with by virtue of his activities on behalf of the Machinist's Union (Tr. 29). The conversations that are referred to by the Board in making its findings set forth above actually amounted to a difference of opinion between two of the petitioner's supervisory employees, one employee taking one position, and the other another position.

Benton (Tr. 204) stated that in one conversation with Bob Wells, that he stuck up for the union. Further, that

he (Benton) remarked that he thought the union was a good thing if it was lived up to. We find in this instance a supervisor whose actions could be attributed to the employer, taking the opposite position of Bob Wells. The rank and file employees involved in this case were under the direct supervision of Benton. It would seem reasonable that they would fear Benton more in respect to exercising their rights under the Act than they would Bob Wells.

In determining whether statements by supervisory employees constituted interference, restraint or coercion as unfair labor practices, reviewing court must decide whether it could reasonably be concluded that the statements interfered with, restrained or coerced employees in the exercise of their statutory rights.

National Labor Relations Board v. Pacific Gas & Electric Co., (Ninth Circuit) 118 Fed. (2d) 780.

Could it be said that the arguments of Benton and Bob Wells, in which Benton stuck up for the union and Wells expressed his opinion in regard to unions, were such statements that they interfered with, restrained or coerced the employees in the exercise of their statutory rights?

It is certainly inconsistent to find that Benton's actions interfered with the free and untrammelled will of the employees (Tr. 29); that is, that the actions of Benton, because of his procuring union membership, interfered with the employees' rights; then for the Board to find that Bob Wells' statements (Tr. 25) had discouraged union membership; or had made the men fearful of reprisals.

The courts have held that the findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive; however, this does not compel this court to accept findings where the Board accepted part of the evidence and totally disregard other convincing evidence.

National Labor Relations Board v. Union Pacific Stages, 99 Fed. (2d), 153, supra.

An employer may express an opinion regarding labor matters if it carries no threat of discrimination and does not interfere with attempts of his employees to organize.

The majority of the Board found (Tr. 25) that the petitioner engaged in dilatory tactics during collective bargaining negotiations. Yet the Board dismissed the allegations of the complaint (Tr. 27) that the respondent violated Section 8 (5) of the Act; that is, refusal to bargain. Now, if the petitioner had no obligation under the Act to bargain with the union, how could it be said that it used dilatory tactics during collective bargaining negotiations.

As far as we can determine, the Board finds that utterances of the representatives, as such, were coercive. There certainly is no evidence to show that any utterances made by management's representatives had any effect in discouraging union activities, or made the men fearful of reprisals.

Finally, we have the very recent expression of Mr. Justice Jackson's opinion in *Thomas v. Collins*: (65 Sup. Ct. 315, 330 [1945])

"Speech of employers otherwise beyond reach of the Federal Government is brought within the Labor Board's power to suppress by associating it with 'coercion' or 'domination' . . . Whether in a particular case the association or characterization is a proven and valid one often is difficult to resolve. If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one."

The conclusion apparently reached by some courts that they are bound by the Board's finding that speech is coercive undoubtedly rests upon the premise that such a finding is one of *fact*. What has been recently written by one learned writer on the distinction between questions of law and questions of fact in administrative proceedings would lead one to conclude that the question of the factors which the administrative agency may consider in applying the statutory norm is a matter of law for the consideration of the courts. (Brown, *Fact and Law in Judicial Review*, 1943, 56 Harv. L. Rev. 899.) Accordingly, even without recourse to the Constitutional argument, it may be urged that the employer is en-

titled to a judicial review of the question whether or not his words, as such, fall within the condemnation of the statute. Since a constitutional privilege is involved, *a fortiori* the employer is entitled to a judicial review.

In connection with the problem we are now considering, an important distinction must be observed. Speech is merely one form of conduct, but it is also a species of conduct specifically protected by the First Amendment. Employer utterances may be involved in a charge of unfair labor practices in two respects. An utterance may be considered by the Board merely as circumstantial or cumulative evidence utilized to characterize other conduct—a “verbal act.” (6 Wigmore, Evidence [3d ed. 1940] paragraphs 1772-1792). It would seem to us that freedom of speech would be violated merely by condemning a privileged utterance as an unfair labor practice, and hence, unlawful.

It is submitted that the employer is entitled to judicial review of the Board's finding that his utterances, as such, are coercive, and that the courts are not conclusively bound by the Board's findings in this respect. Even though there may be no decisions of the highest court in the land directly sustaining this view, there is strong language supporting its validity. In the case of *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 52, 56 Sup. Ct. 720, 726 (1936), we find this pertinent statement as to administrative agencies:

“But to say that their findings of fact may be made conclusively where constitutional rights of liberty and property are involved, although the evidence clearly established that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.”

Baltimore & Ohio R. R. Co. v. United States, 298 U. S. 349, 56 Sup. Ct. 797 (1936). *Ohio Valley Water Co. v. Ben Avon Borough*, 235 U. S. 287, 40 Sup. Ct. 527 (1920); *Crowell v. Benson*, 285 U. S. 287, 40 Sup. Ct. 285 (1932). Cf. *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644 (1905); *Dickinson, Judicial Review of Administrative Determinations*

(1941) 25 Minn. L. Rev. 588, 595-599; McGovney, Administrative Decisions and Court Review (1941) 29 Calif. L. Rev. 110.

Even more pertinent language is contained in another Supreme Court decision involving labor's right to free expression:

"Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality . . . And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 293; 61 Sup. Ct. 552, 555 (1941).

As a matter of fact the Supreme Court in upholding the constitutionality of the Wagner Act, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47, 57 Sup. Ct. 615, 629 (1935); see also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49, 58 Sup. Ct. 459 (1938), said, specifically, in answer to the charge that in its procedural aspects the Act was unconstitutional, that, upon review of Board orders, "all questions of constitutional right, . . . are open to examination by the court."

CONCLUSION

In conclusion, it is the position of this petitioner that Benton's discharge was not discriminatory in any manner. That the employer was doing only that which he was compelled to do under the Act, that is to terminate any unlawful activities in any manner it saw fit of any employee who was a representative of management such as Benton. To delve into the basis or reason for such discharge is mere speculation. To permit this would be to encroach upon management's prerogative.

There is no evidence whatsoever which shows that the effect of Benton's discharge was to discourage union membership or in any way interfere with rights of the rank and

file to self-organization; that management's compliance with the law in terminating such unlawful activities, cannot be a basis for inferring that such discharge had the effect as found by the Board. If this was true, then it could be found in every instance where an employer terminates the unlawful activities of a foreman who is encouraging and soliciting union membership.

Certainly to compel this petitioner to reinstate Benton to his former position as management's representative could not be said to effectuate the policy of the National Labor Relations Act. To have Benton as a trustee of the local union and shop steward for the union working for the petitioner as management's representative certainly could not be said to effectuate the policies of the Act.

The history as shown by the record in this case of the petitioner is not one of anti-union or hostility. It has been doing business with a number of unions as the record discloses, and particularly the one in question, why should it all of a sudden attempt to become hostile at Reno, Nevada?

There is no history or pattern of anti-union attitude or hostility toward the union to base a finding on isolated statements, particularly when such statements in and of themselves are not coercive. To do this would violate the right of the employer to free speech as guaranteed by the First Amendment to the Constitution of the United States. We feel that this court may judicially review the evidence with respect to these isolated transactions and is not bound to adhere to the position that if supported by substantial evidence they are conclusive on this court.

Respectfully submitted,

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No. 11,388

In the United States Circuit Court of Appeals
for the Ninth Circuit

WELLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AND ON APPEAL
FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
Jurisdiction.....	1
Statement of the case.....	2
Summary of argument.....	3
Argument.....	3
I. The Board's findings that petitioner has engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act are supported by substantial evidence.....	3
A. Interference, restraint, and coercion.....	6
B. The discriminatory discharge of Benton.....	9
C. The illegality of petitioner's conduct.....	14
II. The Board's order is valid.....	22
Conclusion.....	22

TABLE OF AUTHORITIES

Cases:	
<i>Ever-Ready Label Corp., Matter of</i> , 54 N. L. R. B. 551.....	20
<i>Fine Art Novelty Corp., Matter of</i> , 54 N. L. R. B. 480.....	20
<i>Houston Shipbuilding Corp., Matter of</i> , 56 N. L. R. B. 1684.....	20
<i>Midwest Piping and Supply Co., Inc., Matter of</i> , 63 N. L. R. B. 1060.....	20
<i>N. L. R. B. v. American Potash and Chemical Corp.</i> , 98 F. 2d 488 (C. C. A. 9), cert. denied, 306 U. S. 643.....	19
<i>N. L. R. B. v. Gluek Brewing Co.</i> , 144 F. 2d 847 (C. C. A. 8).....	15
<i>N. L. R. B. v. Hudson Motor Car Co.</i> , 128 F. 2d 528 (C. C. A. 6).....	15
<i>N. L. R. B. v. Mackay Radio & Telegraph Co.</i> , 304 U. S. 333.....	22
<i>N. L. R. B. v. Richter's Bakery</i> , 140 F. 2d 870 (C. C. A. 5), cert. denied, 322 U. S. 754, enforcing, 46 N. L. R. B. 447.....	19
<i>N. L. R. B. v. Star Publishing Co.</i> , 97 F. 2d 465 (C. C. A. 9).....	15
<i>N. L. R. B. v. Walt Disney Products</i> , 146 F. 2d 44 (C. C. A. 9), cert. denied, 324 U. S. 877.....	15, 19
<i>N. L. R. B. v. Whiting Mead Co.</i> , 148 F. 2d 817 (C. C. A. 9), enforcing 45 N. L. R. B. 987.....	19
<i>Serrick Corp., Matter of</i> , 8 N. L. R. B. 621, enforced, <i>sub nomine</i> , <i>International Association of Machinists v. N. L. R. B.</i> , 311 U. S. 72.....	20

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11388

WELLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION TO REVIEW AND SET ASIDE, AND ON REQUEST
FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case comes before the Court upon a petition of Wells, Inc., pursuant to Section 10 (f) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*),¹ to review and set aside an order issued against it by the National Labor Relations Board pursuant to Section 10 (c) of the Act (R. 323-333, 342-345). In its answer, the Board has requested that the order be enforced (R. 334-342). The jurisdiction of this Court is based upon Section 10 (e) and (f) of the Act. The unfair labor practices found

¹ Relevant portions of the Act appear in the Appendix, *infra*, pp. 23-24.

by the Board occurred at petitioner's place of business in Reno, Nevada,² within this judicial circuit.

STATEMENT OF THE CASE

The Board's order (R. 29-31) is based upon findings³ that petitioner discriminatorily discharged employee Jack Benton for the purpose of discouraging membership and activity in Local 801 of the International Association of Machinists, A. F. of L., hereinafter called the Union (R. 22, 27). The Board further found that by making disparaging remarks concerning the Union, by questioning employees regarding their union affiliation, and by other acts, petitioner interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them in Section 7 of the Act, in violation of Section 8 (1) of the Act (R. 25-26, 60-62, 65).⁴ The order requires petitioner to cease and desist from the unfair labor practices found, to offer reinstatement and back pay to Jack Benton, and to post appropriate notices (R. 29-31).

² Petitioner, a Nevada corporation, with its principal office and place of business in Reno, Nevada, is engaged in the transportation of freight by motor. During the twelve-month period ending June 30, 1945, petitioner transported 194,577 tons of freight, 72.8 percent of which was transported in interstate commerce. The foregoing facts are admitted and no jurisdictional question is presented (R. 4, 10).

³ The Board in its decision, adopted the findings, conclusions, and recommendations of the Trial Examiner in his Intermediate Report with certain modifications expressly noted in the decision (R. 22).

⁴ The Board dismissed the complaint insofar as it alleged that petitioner had violated Section 8 (5) of the Act by refusing to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit (R. 27-29, 31).

SUMMARY OF ARGUMENT

I. The Board's findings that petitioner has engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act are supported by substantial evidence.

II. The Board's order is valid and proper.

ARGUMENT

POINT I

The Board's findings that petitioner has engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act are supported by substantial evidence

Introduction

The facts which give rise to the central issues in this case can be stated briefly. Petitioner, Wells, Inc., operates an interstate trucking business with branches at Reno and Luning, Nevada (R. 4, 10, 233-234). Another corporation, Wells Cargo, Inc., almost wholly owned by petitioner's stockholders and operated by petitioner's officers, maintains a repair shop at Las Vegas, Nevada (R. 250-251, 233). At Reno and Luning, petitioner employs line drivers, as well as repair and maintenance men such as machinists, washers, tire men, hostellers, greasers and parts men (R. 237-238, 266, 257, 263). During the periods here relevant, petitioner operated under contracts with the International Brotherhood of Teamsters, an affiliate of the American Federation of Labor, hereinafter called the Teamsters, covering the line drivers, grease men, tire men and washers, employed at Luning (R. 260, 266, 268, 290), and the line drivers employed at Reno (R. 263, 290).

On May 16, 1944, petitioner's officers, on behalf of Wells Cargo, Inc., entered into a contract with the International Association of Machinists, hereinafter called the Machinists, covering all employees subject to the jurisdiction of that organization employed by Wells Cargo at Las Vegas (R. 144-145, 156-157, 233, 310-311).⁵ At this meeting, the Machinists' representatives informed petitioner that they also represented the same categories of employees employed by Wells, Inc., at its Reno shops, and asked petitioner to enter into a contract for these employees, similar to the one which had just been negotiated covering the Las Vegas employees (R. 144-146). Although petitioner did not challenge the Machinists' claim to represent the maintenance employees at Reno, it balked at negotiating with that union on their behalf. R. 146-147). Aware that many of the maintenance men employed by Wells, Inc., at Luning were covered under the Teamsters' contract, petitioner was admittedly afraid that if it recognized the Machinists as bargaining representative for such employees at Reno, it would be faced with a jurisdictional dispute there (R. 237-

⁵ There is no evidence in the record, and petitioner does not claim, that Wells Cargo or petitioner had a contract with the Teamsters covering any Las Vegas employees. The only contract which petitioner or any of its affiliates ever executed with the Machinists, so far as the record shows, is this Wells Cargo contract relating to the Las Vegas operation. The assertion in the dissenting opinion (R. 32), repeated by petitioner in its brief (p. 14), that petitioner had entered into a collective agreement with the Machinists covering employees in its Luning division is inaccurate. The reference cited by petitioner in its brief to support this assertion (R. 266) speaks of the Luning contract, dated July 3, 1945, between petitioner and the Teamsters. The record shows merely that at one time this contract between petitioner and the

238, Petitioner's brief, pp. 5, 16).⁶ In the latter part of September or early October 1944, having stalled negotiations with the Machinists in the interim, petitioner's president, J. W. Wells, contacted Harry Anderson, the Teamsters' business agent at Reno, and inquired whether the Teamsters would object if petitioner recognized the Machinists as bargaining representative for the "greasers, washers and other men" employed at Reno, classifications which, at Luning, were represented by the Teamsters (R. 239). Anderson replied that these classifications "belonged" to the Teamsters, that the Teamsters would represent them and that petitioner "would get into trouble" if it "negotiated with the Machinists signing up these employees" (R. 239, cf. Petitioner's brief, pp. 5, 16).⁷

Teamsters covered "Mechanics" as well as other maintenance men, but that after the Machinists reaffiliated with the American Federation of Labor the Teamsters waived application of the contract as to "Mechanics," while retaining jurisdiction over the other maintenance men, such as greasers (R. 267-268).

⁶ This, of course, was not the situation at Las Vegas, where petitioner did enter into a contract with the Machinists, since the Teamsters, so far as the record shows, did not claim to represent any of the employees there (see note 5, *supra*).

⁷ In oral argument before the Board's Trial Examiner, petitioner's counsel summed up the situation we have described above as follows (R. 289-290):

"* * * the Teamsters, and it is common knowledge, ordinarily takes in greasers, washers, tiremen, and so forth. Mr. Wells knew that it was in his contract at Luning. He knew Teamsters claimed that. It is only natural, he did the natural thing in finding out if the Teamsters were going to claim the greasers and helpers. He didn't want a jurisdictional dispute. That is what he was trying to avoid because he knew immediately after talking to Mr. Anderson if he had gone ahead and recognized the Machinists for the greasers he was in trouble. Mr. Anderson was here at this hearing yesterday and I am convinced had the situation not been as it was, he would have come in here and protested."

Its fears having thus been confirmed, petitioner, instead of abiding by the desires of the Reno greasers and other maintenance employees involved, as the law requires, undertook a campaign to frustrate their selection of the Machinists as bargaining representative and to restrain and coerce them into repudiating that union.⁸

A. Interference, restraint, and coercion

Although in the initial conferences with the Machinists' representatives (*supra*, p. 4), Wells had accepted without question their claim to represent the Reno employees (R. 146, 122, 150), at a conference on October 5, 1944, he demanded proof that the employees desired to be represented by that union (R. 151). After examining the authorizations which McShane, the Machinists' representative, thereupon produced, Wells exclaimed, "Hell, you've got everybody on there but me" (R. 152). Nevertheless, Wells, again postponed action on the proposed contract, this time on the plea that Howard and Robert Wells, who were in

⁸ The dissenting member of the Board, erroneously assuming that petitioner had entered into a contract with the Machinists at Luning (R. 32), where the Teamsters represented the line drivers and greasers, saw no reason to infer that petitioner would have been more opposed to dealing with the Machinists at Reno than at Luning since the threat of a jurisdictional dispute with the Teamsters, on that assumed state of facts, was, presumably, equally imminent at both places. He therefore concluded that petitioner's conduct at Reno was not intended to discourage membership in the Machinists. But since this inference rests completely on the assumption of a contract between petitioner and the Machinists at Luning, a fact which the record refutes (see note 5, *supra*), the argument falls. Moreover, unlike the situation at Reno, the record does not show that there was a jurisdictional dispute between the Teamsters and the Machinists over the representation of maintenance men, such as greasers, at Luning.

charge of the Reno operations, should participate in the negotiations (R. 153), and for two months thereafter successfully evaded the demands of the Machinists' representatives for further meetings (R. 162-166, 317-318). On December 22, 1944, at the instance of the United States Conciliation Service, whose assistance had been invoked by the Machinists, petitioner finally met again with the representatives of that union (R. 165-166). At the meeting Wells made it perfectly clear that under no circumstances would he enter into a contract with the Machinists covering the employees at Reno. He stated bluntly that rather than "submit to any of the conditions [that the Union] * * * asked" he would move the Reno operations to Salt Lake City (R. 169). During the course of the meeting, J. W. Wells left the conference, and, after questioning some of the Reno employees, returned half an hour later to announce that he had "found out that some of them didn't want the Union to represent them and that [Wells] would not at that time recognize [the Union] as representing his employees" (R. 167-168). Although the Commissioner of Conciliation suggested that the negotiations be continued, petitioner refused to resume discussion of the contract (R. 168-169).

During the months between September and December 1944, petitioner brought home to the employees directly, as well as to the representatives they had selected, its opposition to their choice of the Machinists to bargain for them. In September 1944, petitioner's secretary, Robert Wells, during a conversation with employee Benton which was held in the

presence of other employees on the day shift, stated that "Unions were lousy, Unions would keep a good man down and promote a sorry man. * * * Anytime a company that was working men couldn't fire a man without being told by the Union what to do, why it was a hell of a place to work" (R. 204-205). In December 1944, Robert Wells, referring to Benton's union button, asked Benton "what that yellow thing was on [his] * * * sweater," adding, "Did a bird fly over you?" (R. 206). It is not surprising that petitioner's animosity toward the Machinists was displayed in its attitude toward Benton in particular, for at the conference on December 22, President Wells stated that he regarded Benton as being "responsible for [petitioner's] * * * employees being members of the Union and wishing to be represented by it" (R. 168-169).

To make its hostility to the Machinists even more apparent, petitioner barred the Machinists' business representative from the Reno shop. Previously, petitioner had permitted the Machinists' representatives, as it permitted the Teamsters' representatives, to come to the shop during the lunch hour, to confer with the employees and collect dues (R. 123-124, 207-208). On one occasion in December 1944, when McKay, a business agent for the Machinists, entered the machine shop during the lunch hour, Robert Wells, petitioner's secretary, approached and brusquely informed him that he did not want him "in the shop bothering the men" and ordered him to "get out and stay out" (R. 123-124, 125-126, 207-208). The employees resented this discrimination against the Machinists' rep-

representative; Benton objected to management that he did not understand why McKay could not collect dues in the shop when "the Teamster boss comes in here any time he wants to and talks for a long period of time" (R. 207-208).⁹

B. The discriminatory discharge of Benton

Following its refusal to negotiate further with the Machinists at the December 22 conference, petitioner, on January 31, 1945, climaxed its campaign to force the employees to forego representation by that union by discharging Benton. In attempting to explain this action as something other than a move to discourage the employees from continuing their affiliation with the Machinists, petitioner advanced reasons for the discharge so patently untenable as to leave no doubt in the minds of the employees that the sole motive which actuated petitioner in discharging Benton was petitioner's animus toward their affiliation with the Machinists (R. 25-26).

The circumstances were these: At the time of his discharge, Benton had been in petitioner's employ for a substantial period of time. He began working for petitioner as a mechanic on August 17, 1942, at a monthly salary of \$250 (R. 189-190). In April 1943, petitioner promoted him to the position of foreman in charge of its repair shop (R. 189-190), at a salary of \$325 per month (R. 192). As foreman, Benton supervised the work in the repair shop where petitioner's

⁹ The organizer for the Teamsters Union commonly visited petitioner's shop and on occasion spent as much as 30 or 45 minutes talking with an employee, without objection from petitioner (R. 208).

trucks were serviced and repaired (R. 83) and had authority to hire and discharge employees which he exercised (R. 83-84). Some six or eight months after his promotion to the position of foreman, Benton's salary was raised to \$350 per month (R. 192) and subsequently he received a further increase to \$375 per month (R. 192). During the December 22 conference, J. W. Wells described Benton as "a first-class foreman" who did a "good job" for petitioner and whose "work was satisfactory in every way" (R. 168-169).

Benton had joined the Machinists in October 1942 (R. 193) and was one of its most active members. At the time of his discharge, he was union steward and trustee (R. 193) and he openly wore his union button most of the time while at work (R. 205). Benton had also spoken to rank and file employees about the Machinists and solicited some of them to join the Union (R. 216-217). That his wearing of the union button had attracted petitioner's attention is evident from the derogatory comment which Robert Wells had made to Benton in December 1944 concerning that "yellow thing" on his sweater (R. 206). Petitioner's strong animus against Benton because of his activities on behalf of the Machinists appears, moreover, from President Wells' resentful statement at the conference on December 22, that Benton was responsible for the employees' desire to be represented by the Machinists (*supra*, p. 8).

Late in December 1944 or early in January 1945, Benton spoke with his superior, Superintendent Divine, concerning his job as foreman. Benton told Divine that as foreman he received only \$25 more than some

of the mechanics who were earning as much as \$350 per month and that, unlike the ordinary mechanics, he received no extra compensation for the considerable overtime which it was necessary for him to work (R. 210-211). Benton then stated that he "wondered" whether Divine could obtain "a little more money" for him or if that was not possible, he "wondered if he could get another foreman and give [Benton] * * * a job back as a mechanic" (R. 210-211). Divine, who had already "indirectly" discussed with Benton the possibility of Benton working as a mechanic on the night shift with which petitioner was then having "quite a bit of trouble" since "qualified men" were not available, replied that he would see what he could do (R. 211). He told Benton that he thought that everything could be "arranged" and advised him not to worry (R. 211).

Benton heard nothing further until several weeks later on January 31. Five minutes before quitting time on that day, Divine told Benton that he was "relieved" of his "shop foreman duties" and that it would not "work out" for Benton to become a rank and file mechanic (R. 211). In response to Benton's question, "In other words, you mean that I am fired?", Divine replied, "If you look at it that way, yes." (R. 211-212). On February 6 or 7, when Benton returned to receive his final pay check and his tools, he was given a release slip by petitioner for presentation to the United States Employment Service office (R. 270-271, 212). This release slip stated that Benton had been "discharged for lack of cooperation" (R. 271).

At the hearing, petitioner offered no evidence whatever to support its claim that Benton had been guilty of "lack of cooperation." So far as appears from the record, the only conduct of Benton which could conceivably fall within that category was his activity on behalf of the Machinists. Obviously, in petitioner's eyes, his conduct in this respect was not "cooperative," because it did not comport with petitioner's policy of opposition to the Machinists as representative of the Reno employees.

Superintendent Divine, who testified at the hearing, attempted to attribute the discharge of Benton to the latter's request, made several weeks before, for a salary increase or a demotion (R. 220-222). Thus, on direct examination, Divine testified that Benton was discharged¹⁰ because he wanted to be relieved of his job as a foreman and "go to work in the shop as a mechanic" (R. 221); that petitioner did not grant that request because the demotion of a foreman to a nonsupervisory position "has never worked out" (R. 221), allegedly because foremen, when demoted, "won't concentrate on the work" and are "constantly criticizing" (R. 225). On cross-examination, however, Divine admitted that his generalization was applicable only to cases where foremen had been demoted in-

¹⁰ Petitioner's contentions concerning Benton are contradictory. Although at the oral argument before the Trial Examiner, petitioner took the position that it laid Benton off because he did "not want the job classification [petitioner desired] * * * him to have" (R. 292), subsequently in its brief in support of its exceptions to the Intermediate Report, petitioner asserted that Benton quit his employment (Br. p. 1). As indicated herein, the Board found that petitioner discharged Benton (*supra*, pp. 2, 9, *infra*, p. 14), and substantial evidence supports that finding.

voluntarily and that he had no evidence that the demotion of a foreman at his own request would prove unsatisfactory (R. 226). Apart from this admission, however, the evidence affirmatively shows that Divine had no real doubts about the feasibility of granting Benton's request for a demotion, for, when Benton requested the demotion, Divine had replied, "Well, I will see what I can do * * * I think everything can be arranged and don't worry" (R. 211). Indeed, Divine had himself made the suggestion "indirectly" that Benton resume work as a mechanic on the night shift since petitioner "was having quite a little bit of trouble" and "didn't have the qualified men" (R. 210-211). At no time during the intervening weeks prior to his summary discharge on January 31, did Divine indicate to Benton that he had changed his mind as to the propriety of such a transfer (R. 211).

But even assuming that petitioner would have had grounds for refusing to demote Benton as he requested, such grounds could not, under any circumstances, have been the basis for Benton's abrupt dismissal from his position as foreman. In asking for an increase in salary or for demotion to the job of a rank and file mechanic, Benton did not condition his continued employment upon the granting of either request. His requests were not given as an ultimatum (R. 210-211). To the contrary, his language was tentative and he "wondered if [he] * * * could get some more money. If that wasn't satisfactory [he] * * * wondered if [Divine] * * * could get another foreman and give [him] * * * back a job as mechanic" (R. 210-211). Nor did Superin-

tendent Divine regard Benton's requests as an ultimatum that he would resign in the event neither request was granted. Divine, as set forth above, told Benton on January 31, 1945, that he was "relieved" of his duties as foreman and that he could not work as an ordinary machanic. When Benton asked whether Divine meant that he was "fired", Divine replied, "If you look at it that way, yes." (*supra*, p. 11).

The discharge of Benton, an admittedly competent employee who had repeatedly been given increases in salary, at a time when the manpower shortage was acute throughout the country and petitioner admittedly "didn't have the qualified men" (R. 211), thus stands utterly unexplained by petitioner. The record leaves open no inference other than the one drawn by the Board, that petitioner used the situation created by Benton's alternative requests for an increase in pay or a demotion "as a pretext for terminating Benton's employment in order to discourage union membership" (R. 23).

C. The illegality of petitioner's conduct

The evidence set forth above demonstrates conclusively, as the Board found (R. 25), that petitioner was opposed to the selection of the Machinists as bargaining agent by the employees in its Reno shop. To destroy the status of that union among the Reno employees, petitioner engaged in dilatory and evasive bargaining tactics, and finally broke off negotiations with the union completely; it questioned employees about their union affiliation, made disparaging re-

marks concerning the Machinists, discriminatorily denied access to the shop to the Machinists' representative, and finally, discharged Benton (*supra*, pp. 6-14). The tendency of such a course of conduct to have its desired effect and its consequent illegality under the Act are not open to question. *N. L. R. B. v. Walt Disney Products*, 146 F. 2d 44, 49 (C. C. A. 9) cert. denied, 324 U. S. 877. Nor is it any defense to petitioner that its conduct may have been motivated not by hostility to unionization as such, or even by hostility to the Machinists generally, but rather by a desire to avoid the reprisals which the Teamsters had threatened if petitioner honored its employees' choice of bargaining representatives at the Reno shop.

Hardships which would be imposed upon an employer by a rival union if the employer obeyed his obligations under the Act do not exculpate an employer who uses coercion, intimidation or discrimination to relieve himself of those obligations. *N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 471 (C. C. A. 9); *N. L. R. B. v. Hudson Motor Car Co.*, 128 F. 2d 528 (C. C. A. 6); *N. L. R. B. v. Gluek Brewing Co.*, 144 F. 2d 847 (C. C. A. 8). As this Court said in the *Star Publishing* case: "The Act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by the employer."

At the oral argument before the Trial Examiner, petitioner contended for the first time that even if it

discharged Benton discriminatorily, nevertheless the discharge was not cognizable under the Act because, since Benton was a foreman, his activities among rank and file employees on behalf of the Machinists were not protected by the Act (R. 290-292). And in its brief before this Court, petitioner rests heavily upon that contention, asserting in addition that it was bound by the Act to terminate Benton's unlawful activities (p. 12); that it could properly have accomplished that objective by discharging Benton (p. 16); and that the Board's holding that Benton's discharge was violative of Section 8 (3) of the Act constitutes an unwarranted invasion of petitioner's "managerial prerogative" to determine for itself how best to avoid charges of lack of neutrality as between rival labor organizations (p. 16).

In the first place, petitioner has never contended, in fact it expressly denied, that it discharged Benton to protect its neutrality or because it believed that Benton's activities were illegal and might involve petitioner in unfair labor proceedings under the Act (R. 291-292).¹¹ Petitioner's contention, therefore, that

¹¹ The assertion in the opinion of the dissenting member of the Board, repeated in petitioner's brief, pp. 16-17, that petitioner's counsel, at oral argument before the Trial Examiner, stated that prior to Benton's discharge he had advised petitioner that Benton's conduct was compromising its neutrality and might subject petitioner to charges of unfair labor practices, is not borne out by the record. The record shows that not only did petitioner's counsel not so advise Wells prior to Benton's discharge, but indeed that he did not then even know of Benton's activities which petitioner now claims it considered illegal. At the oral argument petitioner's counsel said in this connection: "*If I had known about it, I certainly would have advised the Company to discharge any fore-*

since Benton's activities were illegal, petitioner would have been justified in discharging him on that account, is irrelevant here. The Board did not deny that an employer, to protect his neutrality, could take such appropriate disciplinary action against offending foremen as the employer saw fit (R. 26, note 4). It did not attempt to assess the propriety or impropriety of petitioner's discharge of Benton as a measure to preserve petitioner's neutrality or to vindicate the rights of rank and file employees to full freedom of choice of representatives under the Act. Since petitioner discharged Benton not for this reason, but solely to discourage the employees at Reno from affiliating with the Machinists, the Board's determination that the discharge violated Section 8 (3) was predicated not on a consideration of the nature or propriety of the possible remedy petitioner might have invoked to accomplish a permissible objective, but upon the fact that the discharge was actually effected as economic reprisal aimed at accomplishing a forbidden objective (R. 25-27).

Nor is there merit in petitioner's argument that because Benton's activities among rank and file employees on behalf of the Machinists were not protected

man who is for or against any labor organization" (R. 291-292). Interestingly enough, petitioner did not follow this advice, for another of its foremen, who was also a member of the Machinists, but apparently by no means as active on its behalf as Benton, was not discharged, reprimanded in any way, or even cautioned to refrain from unneutral conduct (Petitioner's brief, p. 14). This, of course, provides further evidence, if more were needed, that petitioner was not motivated in discharging Benton by any concern over the possible coercive effects of his conduct on the rank and file, or by a desire to avoid charges of unfair labor practice.

by the Act, the Board could not properly find that by discharging Benton for engaging in such activities, petitioner violated the Act. The literal language of Section 8 (3) prohibits discrimination "to * * * discourage membership in a labor organization." Petitioner's ^{discharge} discharge of Benton, tested both by its purpose and by its normal and necessary effect, falls squarely within that statutory prohibition. By discharging Benton, petitioner, as the Board found (R. 27), sought to discharge *the rank and file employees* at Reno from affiliating with the Machinists.¹² The discharge, so patently discriminatory, could hardly fail to have that effect.

Whether or not Benton himself, as a foreman, is entitled to protection against employer coercion and discrimination in becoming a member of the Machinists, or selecting that union as his bargaining representative, it is perfectly clear that petitioner's rank and file employees are entitled to such protection. Petitioner, by discharging Benton, and thus giving the ordinary employees an object lesson concerning the

¹² Petitioner's contention (brief, pp. 11-18), that the Board could not properly have found that its conduct tended to discourage rank and file employees, as well as foremen, from becoming and remaining members of the Machinists is utterly without merit. Petitioner's hostile attitude toward the Machinists as bargaining agent for the Reno employees was made abundantly apparent to the rank and file employees. And at no time did petitioner indicate to them, or even to Benton himself, that its animus toward Benton for supporting the Machinists stemmed from the fact that Benton was a foreman rather than a rank and file employee. Under these circumstances, the employees could not have failed to conclude that Benton was made the object of petitioner's retributive displeasure, not because he was a foreman, but simply because he was an outstanding advocate for the Machinists.

dangers of affiliation with the Machinists, infringed their right freely to select the Machinists as their bargaining representative, and in so doing, violated the Act.¹³ What petitioner's contention really amounts to is that since Benton participated in inducing employees to join the Machinists in the first place and their selection of that organization therefore was not to be deemed wholly voluntary, petitioner was entitled to dissipate the effects of Benton's interference by intimidating the employees to revoke their selection.

But it does not follow that because employees may not have been entirely free from the influences of employer economic power when they first selected a particular labor organization to bargain for them, the employer is therefore entitled to utilize his economic power to restrain them forever after from voluntarily selecting that organization to bargain for them. In cases where the Board finds that an employer has granted assistance to a nationally affiliated labor organization in obtaining adherents among employees, it orders the employer to cease and desist from rendering such assistance, and to refrain from recognizing the organization until it has been certified by the

¹³ Compare *N. L. R. B. v. Whiting Mead Co.*, 148 F. 2d 817 (C. C. A. 9), enforcing 45 N. L. R. B. 987, 1015-1018; *N. L. R. B. v. American Potash & Chemical Corp.*, 98 F. 2d 488, 493 (C. C. A. 9), cert. denied, 306 U. S. 643; *N. L. R. B. v. Richter's Bakery*, 140 F. 2d 870 (C. C. A. 5), cert. denied, 322 U. S. 754, enforcing, 46 N. L. R. B. 447, 450, 474-479; *N. L. R. B. v. Walt Disney Products*, 146 F. 2d 44, 49 (C. C. A. 9) cert. denied, 324 U. S. 877. See also the Board cases cited in note 5 of the Board's opinion (R. 26-27) and their treatment by the dissenting member of the Board in note 11 of his opinion (R. 35-36), where he indicates that if he agreed with the Board's view of the facts in the instant case, he would concur in the holding.

Board.¹⁴ In no case, not even one involving a company-dominated union, has the Board ever authorized an employer, by discharge or other exercise of economic power, to coerce employees not to join or to withdraw from a particular labor organization. And it could not do so, because Section 8 (3) of the Act prohibits such conduct in unequivocal terms.

In the instant case, the Board took cognizance of the fact that Benton's activities on behalf of the Machinists tended unduly to influence employees to join that organization. And it undertook to remedy that invasion of the freedom of employees by refusing to accord to the Machinists the status of exclusive bargaining representative under the Act and refusing to order petitioner to bargain with that organization.¹⁵ But it did not deny to the employees the right freely to select the Machinists as their bargaining representative, nor could it sanction conduct of peti-

¹⁴ *Matter of Serrick Corp.*, 8 N. L. R. B. 621, 652-655, enforced, *sub nomine*, *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72; *Matter of Fine Art Novelty Corp.*, 54 N. L. R. B. 480, 487; *Matter of Ever-Ready Label Corp.*, 54 N. L. R. B. 551, 559-560; *Matter of Houston Shipbuilding Corp.*, 56 N. L. R. B. 1684, 1687-1688; *Matter of Midwest Piping & Supply Co.*, 63 N. L. R. B. 1060, 1076-1077.

¹⁵ It should be noted here that petitioner at no time took any action to dissipate the effects of Benton's interference. Not only did it never openly reprimand Benton for his conduct or tell him to desist, but, more significantly, it never informed the employees that Benton would be overruled by management if ever he attempted to use his power as foreman in such a way as to influence them to join the Machinists. Even petitioner's refusal to negotiate with the Machinists was never predicated upon the theory that their majority status was tainted by Benton's support, but stemmed solely from petitioner's desire to avoid dealing with the Machinists at all lest it thereby incur the displeasure of the Teamsters. *Supra*, pp. 4-6.

tioner which tended to have that effect. The Board found it essential to effectuate the policies of the Act that the effects of petitioner's object lesson of reprisal against employees who affiliated with the Machinists be dissipated (R. 25-27), and for this purpose ordered petitioner to reinstate Benton with back pay.

Finally, petitioner contends that the effect of reinstating Benton will be to "give a stamp of approval of Benton's activities in interfering with free and untrammelled rights of the employees to belong to any labor organization which they may desire to choose" (Brief, p. 21). Nothing could be further from the fact. As we have indicated, the Board's order itself denied exclusive bargaining status to the Machinists because it found that Benton's activities impinged upon the freedom of choice of the rank and file employees. That is ample demonstration to petitioner, to Benton, and to the employees, that the Board did not put "a stamp of approval" on Benton's activities. Upon Benton's reinstatement, petitioner will be perfectly free to comply with its statutory duty to require Benton to refrain from engaging in coercive activities among the rank and file employees on behalf of or against any labor organization, and to take such appropriate disciplinary action as it may believe necessary if Benton fails to obey. The Board has not, in this or any other case, found that action by an employer intended to protect the employer's neutrality against compromise by supervisors constituted an unfair labor practice under the Act. Since petitioner's argument rests entirely on the utterly unwarranted assumption that the Board did so in this case, it is obviously without merit.

POINT II

The Board's order is valid

The Board's order (R. 29-31) directs petitioner to cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act, to reinstate Benton with back pay, to cease and desist from interrogating employees concerning their union membership, from threatening employees with economic reprisal to discourage union activity, and from otherwise interfering with the rights of employees under the Act, and to post appropriate notices. The Board's order is "adapted to the situation which calls for redress" (*N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348), and, apart from contesting the validity of the findings on which it rests, petitioner does not challenge its propriety.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper in all respects, and that a decree should issue enforcing the order in full.

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APRIL 1947.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce.

* * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair

labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition and circuit court of appeals of the United States wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11388

WELLS, INC., a corporation, PETITIONER

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

AND

NATIONAL LABOR RELATIONS BOARD, PETITIONER

VS.

WELLS, INC., a corporation, RESPONDENT

REPLY OF WELLS, INC., A CORPORATION,
PETITIONER AND RESPONDENT

Respectfully submitted,

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Attorney for Petitioner.

APR 28 1947

PAUL P. O'BRIEN.

I N D E X

Introduction	1
Argument	2
Conclusions	6

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REPLY OF WELLS, INC., A CORPORATION, PETITIONER AND RESPONDENT

This reply is in response to the brief recently filed on behalf of the National Labor Relations Board, who is respondent to this petitioner's petition for writ of review; and the said National Labor Relations Board has also filed its petition for enforcement and, therefore, is named as petitioner in said brief, and Wells, Inc., named respondent in respect to said petition for enforcement.

For convenience and brevity, in this brief we will refer to the National Labor Relations Board as the Board.

In view of the fact that Wells, Inc., has not yet received the printed brief of the Board, but only the typewritten brief, it, of course, has no alternative but to refer to the pages of the typewritten brief. It must, therefore, be remembered that any reference to the Board's brief is to the typewritten copy.

ARGUMENT

Interference, Restraint and Coercion

The Board in its brief on page five states in substance that Wells, Inc., undertook a campaign to frustrate the selection of the Machinists as bargaining representative and to restrain and coerce them into repudiating that union. After this statement we note that the Board has not cited any pages of the transcript to substantiate this assertion, nor can we believe that the references made in respondent's brief substantiate in any way such a statement. As a matter of fact the Board found (tr. 28 and 29) that since the Union's majority was procured with the direct and open assistance of a supervisory employee (foreman Benton), it cannot be said that the Union represented the free and untrammelled will of the employees and hence the Union's claim that it represented a majority could not be recognized.

Foreman Benton is the employee, the Board found, that Wells, Inc., had discriminatorily discharged. There is not one scintilla of evidence in the record in this case that any action by any representative of the employer, except foreman Benton, in any way interfered with the lawful and untrammelled right of their employees to belong to a labor organization, or any evidence that any action of any of Wells' representatives had such an effect. We must admit, and we agree with the finding of the Board (tr. 28 and 29), that the lawful and untrammelled rights of the employees of Wells, Inc., were interfered with by management's representative, foreman Benton, who was discharged by Wells, Inc.

It is inconsistent for the Board in its brief filed in this cause to contend that Wells restrained and coerced the employees into repudiating the Union when not only is there no evidence to substantiate such fact, but that the Board in its findings (tr. 28 and 29) found to the contrary. How could Wells in one act restrain and coerce the employees in repudiating the Union and at the same time through its representative (foreman Benton) coerce and intimidate the employees in joining the Union?

In answer to the Board's statement of interference, restraint and coercion in pages 6, 7 and 8 of its brief, we refer this Honorable Court to pages 21, 22, 23, 24 and 25 of

petitioner's brief in answer thereto, rather than repeat the same in this reply brief.

It must be remembered (tr. 31) that the Board ordered that the complaint be dismissed insofar as it alleged that the respondent refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in an appropriate unit. Without question, had the company recognized the Union as the representative of its employees, and any employee or rival union filed charges against Wells, Inc. for such action, the Board could within its discretion file unfair labor charges against Wells, Inc., for recognizing such union. The reason being, of course, that management's representative (foreman Benton) had helped procure by his activities a majority of the employees in joining the Union.

The Discrimintory Discharge of Foreman Benton

We are amazed at the statement of the Board on page 17 of its brief that Wells, Inc., by discharging foreman Benton, infringed their right freely (referring to employees to select the Machinists as their bargaining representative, and in so doing violated the act.

Since the Board found (tr. 28 and 29) that the Union's majority was procured with the direct and open assistance of foreman Benton and, therefore, the claim of the Union that it represented the employees, could not be recognized as the valid majority, how then could it be said that by his discharge Wells, Inc., interfered with the employees' right to freely select the Machinists as their bargaining representative; and, therefore, in so discharging foreman Benton, violated the act.

In one breath the Board finds (tr. 28 and 29) that because of management's activities in helping procure a majority of the employees to join the Union (foreman Benton's activities), that it in substance frustrated the untrammled right of its employees to select their own representative; then in the next breath it states that by stopping that activity by management's representative (foreman Benton) by discharging him, it has infringed the free right and will of the employees to select the Machinists as their bargaining representative. We are unable to understand how the Board can take such a position.

On page 18 of the Board's brief it states in substance that the Board found it essential to effectuate the policies of the Act that the effects of petitioner's object lesson of reprisal against employees who affiliated with the Machinists be dissipated. In the first place, foreman Benton was not in the same category as the employees who joined the Machinists Union, inasmuch as he was not among the rank and file employees, but management's representative. There is no evidence to support such a statement that this was petitioner's object lesson of reprisal against employees who affiliated with the Machinists. Foreman Benton was management's representative. The Wells, Inc. has had other foremen affiliated with the machinists, and the employees so knew it, (tr. 128 224 and 32).

The Board has never answered in its brief the statement of Wells, Inc., that an employer such as Wells, Inc., has the affirmative duty to terminate coercive activities of its representatives interfering with the employees' freedom to self-organization, and so long as the employer was doing only what the act commanded him to, that is, to refrain from coercing his employees in the exercise of their right to self-organization, either directly or through his agents, the actual motivation for his conduct is beside the point.

Since foreman Benton engaged in activities in behalf of the rank and file Union in his capacity as management's representative, Wells, Inc., was at liberty to take any steps it deemed appropriate to maintain neutrality.

The Board fails to answer the statement of Wells, Inc., that upon broad implications of the decision in this case reached by the majority of the Board, with one member dissenting, the principle of imputation to the employer of responsibility of the facts and statements of supervisory employees cannot longer prevail if foremen are free to engage in activities in behalf of a rank and file union. Further, the Board by this decision in protecting supervisory employees (such as foreman Benton in his wrongful activities) who have authority to hire and discharge and otherwise effect the tenure and conditions of employment, in their activities in behalf of the rank and file union, the Board has impaired the basic principles, essential for the preservation of employee's freedom to join the labor or-

ganization or select a bargaining representative of their choice.

Where a just ground of discharge appears, it is a matter of mere speculation to say what the motive was for the discharge.

When an employer is bound by law to terminate activities which are prohibited by law, it would be a mere matter of speculation to say what the purpose was and the motive for discharge. The employer in this instance was duty bound to terminate the activities of foreman Benton in any way he saw fit, and an attempt to determine what effect his discharge had would be pure speculation.

Reinstatement of Jack Benton

The Board in its brief did not have much to say in support of the contention that the Board did not err in entering its order directing the reinstatement of foreman Jack Benton to his former position and to make whole the foreman Jack Benton for any loss of earnings he may have suffered by reason of petitioner's alleged discrimination against him.

We certainly can understand why the Board does not have much to say on this point, because it is clear that the Board erred in directing such reinstatement. How can it be said that to effect the purposes of the National Labor Relations Act, it is necessary to offer reinstatement and to make whole any loss of earnings to a foreman who has utterly disregarded the law and subjected his employer to charges of unfair labor practices. To direct that Wells, Inc., comply with such order is to compensate a manager's representative for his wrongful conduct and activities. A Board order directing the reinstatement with back pay of the allegedly discriminatory discharge should not be enforced where the order is based upon mere speculation and conjecture. It is fundamental that one of the purposes of the act is to stop abuses that will interfere with the right of the employee to self-organization.

The Board in its brief puts great emphasis upon the ability of foreman Benton. The question of efficiency or Benton's ability has nothing whatsoever to do with the issue in this case. The facts are simply that Benton, by his

unlawful acts, made it mandatory that Wells, Inc., take some action to terminate his unlawful activities. The method and manner of terminating these activities certainly should be left in the discretion of the employer. If Wells, Inc., had told Benton he was discharged because he was soliciting membership in the rank and file union over whom he directed and supervised, the employer would immediately have been subject under the Board's contention of an unfair labor charge. The Board's theory of this case puts an employer in a very untenable position.

CONCLUSIONS

We just cannot understand how it could be said that the reinstatement of foreman Jack Benton to his former position of management's representative (and we have no assurance he will not continue as union steward and union trustee) under the circumstances in this case effectuates the policies of the National Labor Relations Act.

Certainly such reinstatement would have the effect of giving the stamp of approval of foreman Benton's activities in procuring membership in the rank and file employees whom he supervised, and thereby interfering with the free and untrammelled rights of the employees to belong to any labor organization they desired.

The Board in their brief has put forth a very inconsistent argument. In one breath they contend that by the discharge of Benton and the activities of the management's representatives, the right of the employees to join a labor organization of their own free will and choice has been frustrated. Yet the Board found that by the activities of foreman Benton the majority procured was not a valid majority and in substance that management had procured the majority through its representatives. It cannot be said that management in one action has frustrated the right of the employees to join a labor organization and then in the next breath and under the same circumstances contend that the acts complained of resulted in unlawfully and improperly soliciting and procuring a majority of the employees in the Machinists Union. It just does not make sense.

The Board in its brief has not referred to any evidence to substantiate their argument that the various conversations of management's representatives in any way interfered with the right of the employees to exercise their rights under the act of joining a labor organization; neither is there any evidence referred to in which it could be inferred that such statements in and of themselves interfered with any rights of the employees.

We have not gone into much detail in this reply brief because we feel that the Board's brief raises no new issues and, therefore, we respectfully refer this Honorable Board to the brief heretofore filed by Wells, Inc.

Wells, Inc. feels that the Board's findings are not supported by substantial evidence, that its order is not valid and proper, and that a decree should not be issued enforcing the order in full or in part.

Respectfully submitted,

LOUIS H. CALLISTER,

Attorney for Petitioner.

No. 11390

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLAMETTE TUG AND BARGE COMPANY,
a Corporation,

Appellant,

vs.

OLE ERICKSEN and PACIFIC BUILDING
MATERIALS COMPANY, a Corporation, C.
T. SMITH and ESSON SMITH, co-partners
doing business as C. T. Smith and Son, Claim-
ants of the Tug "CHARLES T", Steamship
"KARL LIEBKNECHT",

Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

SEP 25 1946

PAUL P. O'BRIEN,
CLERK

No. 11390

United States
Circuit Court of Appeals

For the Ninth Circuit.

WILLAMETTE TUG AND BARGE COMPANY,
a Corporation,

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vs.

OLE ERICKSEN and PACIFIC BUILDING
MATERIALS COMPANY, a Corporation, C.
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Answer of C. T. Smith and Esson Smith, Partners, Doing Business as C. T. Smith and Son, to Amended Libel, as Claimants of the Tug "Charles T"	18
---	----

Answer of Willamette Tug and Barge Company, a Corporation, to the Amended Libel of Ole Ericksen and Pacific Building Materials Company, a Corporation	24
---	----

Appeal:

Designation of Apostles on	71
Notice of	63
Petition for	60

Assignment of Errors	66
----------------------------	----

Certificate of Clerk	73
----------------------------	----

Claim of Owner	7
----------------------	---

Designation of Apostles on Appeal	71
---	----

Final Decree	57
--------------------	----

Findings of Fact and Conclusions of Law	51.
---	-----

Libel in Admiralty	3
--------------------------	---

Names and Addresses of Attorneys	1
--	---

INDEX	PAGE
Notice of Appeal	63
Opinion	50
Petition for Appeal	60
Petition to Bring in the Willamette Tug and Barge Company, an Oregon Corporation, under Rule 56, Admiralty Rules of Practice .	10
Pre Trial Order and Admitted Facts	36
Seconded Amended Libel	29
Statements of Points	2
Stipulation to Abide by and Pay the Decree and for Costs	8
Supersedeas Bond	68
Defendant's Exhibits:	
No. 11—Stipulation Re Tug "Charles T" .	96
Respondent's Exhibits:	
No. 12—Statement of Towing Charges for Month of April, 1944	91
No. 13—Check for \$1,411.36 to C. T. Smith and Son	92
No. 14—Statement for May, 1944	93
Witnesses for Claimant:	
Bates, Charles Richard	
—direct	75
—cross	79
—redirect	81

INDEX

PAGE

Witnesses for Claimant—(Continued)

Chappell, Lloyd

—direct	82
—cross	83
—redirect	83
—recross	83

Smith, Esson H.

—direct	84
—cross	88

Witnesses for Respondent:

Riedel, Arthur A.

—direct	97
—cross	101
—redirect	109
—recross	109

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Pacific Bldg. and

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Spalding Bldg.,
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Materials Co., a corporation.

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907 Journal Bldg.,
Portland, Oregon,

For C. T. Smith and Esson Smith, co-part-
ners dba C. T. Smith & Son, Claimants of
the Tug "Charles T".

For Appellees

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11390

OLE ERICKSEN and PACIFIC BUILDING
MATERIALS COMPANY, a corporation,
Libelants,

vs.

Diesel Tug "CHARLES T", C. T. SMITH and
ESSON H. SMITH, co-partners doing busi-
ness as C. T. SMITH & SON, Claimants of
the Tug "CHARLES T",

Appellees,

WILLAMETTE TUG AND BARGE COMPANY,
a corporation,

Appellant,

STEAMSHIP "KARL LIEBKNECHT".

STATEMENT OF POINTS

The points on which appellant Willamette Tug and Barge Company, a corporation, intends to rely on this appeal are the same as stated in its Assignment of Errors which it hereby adopts with this exception:

I.

In finding and holding that the Barge EK-9 was damaged and made less valuable by the following items: Permanent Depreciation, \$1500.00; Supervision of Repairs by Ole Ericksen, \$700.00, being Assignment of Error No. 4 which this appellant

hereby waives and requests that it be not considered by this Court, and appellant hereby concedes that the United States District Court for the District of Oregon was correct in its original holding as to permanent depreciation and supervision of repairs.

/s/ L. A. RECKEN,

Proctor for Appellant Willamette
Tug and Barge Company.

(Acknowledgement of Service.)

[Endorsed]: Filed August 7, 1946. Paul P.
O'Brien, Clerk.

In the District Court of the United States for the
District of Oregon

No. Civil 2489

OLE ERICKSEN and PACIFIC BUILDING
MATERIALS COMPANY, a corporation,
Libelants,

vs.

Diesel Tug "CHARLES T",

Respondent

LIBEL IN ADMIRALTY

To the Honorable the Judges of the District Court
of the United States, for the District of
Oregon:

The libel of the Ole Ericksen, owner of the Barge
EK-9, and Pacific Building Materials Company,
charterer of said barge, against the diesel tug

Charles T, in a cause of towage, civil and maritime, alleges on information and belief as follows:

I.

During the times herein named the libelant Pacific Building Materials Company was and is a corporation organized and existing under the laws of the State of Oregon.

II.

During the times herein named the libelant Ole Ericksen was the owner and the libelant Pacific Building Materials Company was the charterer of that certain wooden cargo-carrying barge known as EK-9.

III.

On or about June 2, 1944, at about 9:45 a.m., the said Barge EK-9, with two other barges, was in tow of the diesel tug Charles T. The crew of said tug consisted of two, namely, Charles Bates, master, and Lloyd Chappell, deckhand. Said tug at said time was proceeding down the Columbia River between Martins Bluff and Deer Island, about [1*] opposite or a short distance below the green lighted buoy off Martins Bluff. At said time and place a certain steamship known as the Karl Liebkenecht was proceeding up the Columbia River. The said parties in charge of the tug Charles T then and there failed to keep and maintain a proper lookout and failed to see or observe the approach of the said steamship, and failed to keep their said tow of barges out of the way of said steamship As a

* Page numbering appearing at foot of page of original certified Transcript of Record.

result of said fault on the part of the said two parties in charge of the navigation of the said Charles T, the said steamship collided with and damaged the said Barge EK-9.

IV.

Libelants do not yet have complete information as to the nature of the damage to the Barge EK-9 but allege on information and belief that the timbers of said barge were by the force of said collision broken, split and damaged to a great extent and that the reasonable cost of repairing said barge will be not less than the sum of \$9,000.00, and the loss of use of said barge during repairs will be not less than \$500.00.

V.

The said tug Charles T is now, or will be during the pendency of process hereunder, within the District of Oregon and within the jurisdiction of this Honorable Court.

VI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelants pray as follows:

1. That process in due form of law, according to the practice of this Honorable Court in cases of admiralty [2] and maritime jurisdiction, may issue against the diesel tug Charles T, her engines, machinery, tackle, apparel, furniture, etc.

2. That all persons claiming any interest in said diesel tug Charles T, her engines, machinery, tackle,

apparel, furniture, etc., be required to appear and answer on oath all and singular the matters aforesaid.

3. That the libelants have a decree for the full amount of their damages with interest and costs.

4. That the diesel tug Charles T be condemned and sold to satisfy the damages of the libelants herein.

5. That this Honorable Court may grant to the libelants, and each and either of them, such other and further relief as to law and justice may appertain.

/s/ MacCORMAC SNOW,
Proctor for Libelants.

United States of America,
District of Oregon—ss.

I, Harry L. Rafferty, being first duly sworn, depose and say: I am secretary of Pacific Building Materials Company, one of the libelants above named; that I have read the foregoing libel and the same is true as I verily believe.

/s/ HARRY L. RAFFERTY.

Subscribed and sworn to before me this 8th day of June, 1944.

(Seal) /s/ DOROTHY FABER,
Notary Public for Oregon.
My Commission Expires: Jan. 20, 1946.

[Endorsed]: Filed June 9, 1944. [3]

[Title of District Court and Cause.]

CLAIM OF OWNER

To the Honorables, the Judges of the United States
District Court for the District of Oregon:

Comes now Esson Smith, general partner and manager of C. T. Smith and Son, a partnership consisting of C. T. Smith and Esson Smith doing business as C. T. Smith and Son, and claims the Diesel Tug "Charles T" and says that the title to the said Diesel Tug "Charles T" was at the time of filing libel herein and still is in the name of C. T. Smith, but that the said partnership was then and now is the true owner of the said vessel, and prays leave to defend this suit accordingly.

This is a claim and not a general appearance.

/s/ ESSON SMITH.

/s/ THOMAS J. WHITE,
Proctor for Claimant.

State of Oregon,
County of Multnomah—ss.

I, Esson Smith, being first duly sworn, depose and say that I have read the foregoing Claim of Owner, know the contents thereof, and that the same is true as I verily believe; that I am a general partner and manager of the partnership of C. T. Smith and Esson Smith, doing business as C. T. [5] Smith and Son; and that I have authority to sign the said Claim of Owner on behalf of the said partnership.

/s/ ESSON H. SMITH.

Subscribed and Sworn to before me a Notary Public in and for the State of Oregon this 10th day of June, 1944.

(Seal) /s/ THOMAS J. WHITE,
Notary Public for Oregon.

My Commission expires July 29, 1946.

(Service admitted—approved as to forms.)

[Endorsed]: Filed June 12, 1944. [6]

[Title of District Court and Cause.]

STIPULATION TO ABIDE BY AND PAY THE
DECREE AND FOR COSTS

Whereas a libel was filed in this Court on the 9th day of June, 1944, by Ole Ericksen and Pacific Building Materials Company, libelants, against the Diesel Tug "Charles T," in rem, for the causes and reasons in said libel mentioned, and praying that process issue against the said Diesel Tug "Charles T" and that the said Diesel Tug "Charles T" be condemned and sold to answer the prayer of said libelants; and

Whereas a warrant of arrest and monition to the United States Marshal to the Diesel Tug "Charles T" was issued by the Clerk of the Court on June 9, 1944, and

Whereas Esson Smith, a general partner of the partnership of C. T. Smith and Esson Smith, doing business as C. T. Smith and Son, has claimed the said Diesel Tug "Charles T" on behalf of her

owner, the said partnership, and prays leave to defend this suit accordingly; and

Whereas the General Casualty Company, a Washington corporation, a Surety Company authorized to do business in the State of Oregon, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant, execution may issue against its goods, chattels and lands in the sum of Ten Thousand Dollars (\$10,000.00),

Now, Therefore, It Is Hereby Stipulated and Agreed for the benefit of whom it may concern, that the said General [7] Casualty Company is bound in the sum of Ten Thousand Dollars (\$10,000.00) conditioned that the claimant above named shall abide by and pay the money awarded in the final decree rendered in this cause, by this Court, or in case of appeal, by the Appellate Court, and conditioned further that the claimant above named shall pay any costs taxed against said claimant by the final decree rendered in this cause by this Court, or in case of appeal, by the Appellate Court.

GENERAL CASUALTY
COMPANY.

[Seal] By /s/ E. J. DeVOE,
Surety.

Dated this 12th day of June, 1944.

(Approved as to form.)

[Endorsed]: Filed June 12, 1944. [8]

[Title of District Court and Cause.]

PETITION TO BRING IN THE WILLAMETTE
TUG AND BARGE COMPANY, AN ORE-
GON CORPORATION, UNDER RULE 56,
ADMIRALTY RULES OF PRACTICE

To: The Honorable James Alger Fee, and the Hon-
orable Claude McCulloch, Judges of the Above-
Entitled Court:

The Petition of C. T. Smith and Esson Smith, part-
ners, doing business as C. T. Smith and Son,
against Willamette Tug and Barge Company,
an Oregon corporation, alleges on information
and belief:

ARTICLE I.

That your petitioners, C. T. Smith and Esson
Smith, are partners doing business as C. T. Smith
and Son, having an office at Stevenson, Washing-
ton, and an office at The Dalles, Oregon, and are
the owners of the Diesel Tug "Charles T," the
registered title to said vessel being in the name of
C. T. Smith.

ARTICLE II.

At all time hereinafter mentioned the Willamette
Tug and Barge Company was, and now is, a cor-
poration duly organized and existing under and by
virtue of the laws of the State of Oregon, having
its principal office and place of business within
the County of Multnomah, State of Oregon, District
of Oregon, and within the jurisdiction of this
Honorable Court.

ARTICLE III.

That on the 9th day of June, 1944, a libel was filed in this court in the above-entitled cause against the said Diesel [29] Tug "Charles T" in rem by Ole Ericksen and Pacific Building Materials Company, a corporation, libelants in a cause of towage, civil and maritime, and the same is now pending, alleging, among other things, that on or about June 2, 1944, at about 9:45 p.m., a certain barge known as Barge EK-9, with two other barges, was in tow of the said Diesel Tug "Charles T"; that the crew of the said tug consisted of Charles Bates, Master, and Lloyd Chappell, deckhand; that said tug was proceeding down the Columbia River between Martin's Bluff and Deer Island, about opposite, or a short distance below the green lighted buoy off Martin's Bluff; that at said time and place the steamship "Karl Liebknecht" was proceeding up the Columbia River; that said parties in charge of the said tug "Charles T" then and there failed to keep a proper lookout and failed to see or observe the approach of the said steamship, and failed to keep the said tow of barges out of the way of the said steamship; and that as the result of the said alleged fault of the parties in charge of the navigation of the said "Charles T," the said steamship collided with and damaged the said Barge EK-9; and alleging further that the said libelants were damaged in a sum not less than \$9,500.00; and that the said libelants are represented in this cause by McCormac Snow, Pacific Building, Portland, Oregon.

ARTICLE IV.

That on or about the 5th day of April, 1944, your petitioners entered into an oral contract with the said Willamette Tug and Barge Company whereby for and in consideration of an agreed rental to be paid by the said Willamette Tug and Barge Company to your petitioners, your petitioners did charter, transfer and deliver to the said Willamette Tug and Barge Company the entire custody, possession, management and control of the said Diesel Tug "Charles T," including the entire command and control [30] over the navigation of the said tug, and that the said tug was being so operated by the said Willamette Tug and Barge Company under the provisions of the said charter at the time and place of the collision alleged in the libel hereinbefore referred to in Article III hereof.

ARTICLE V.

That on or about the 12th day of June, 1944, there was filed in this court by your petitioners, a Claim of Owner wherein it was alleged, among other things, that title to the said Diesel Tug "Charles T" was at that time, and was at the time of filing said libel in the name of C. T. Smith, but that the said partnership hereinbefore alleged in Article I hereof was the true owner of said tug; and leave of this Honorable Court was prayed to defend said claim.

ARTICLE VI.

That thereafter and heretofore, your petitioners filed in this Honorable Court an answer to the said

libel and in said answer alleged on information and belief, among other things, that the said collision and the consequent damage as may have been sustained by the Barge EK-9 were not caused or contributed to by any fault or negligence on the part of the said Diesel Tug "Charles T," or those in charge of her, but were caused solely by the fault and negligence of the said S. S. Karl Leibknecht, her owners, operators and those in charge of her in the following respects, among others:

1. She failed to keep a good lookout;
2. She failed to keep to her own starboard side of the channel;
3. She failed to sound passing or warning signals;
4. She failed to slow, stop or reverse her engines when danger of collision was or should have been apparent;
5. After danger of collision was, or should have been apparent, she failed to take proper precautions to avoid collision; [31]
6. She failed to alter her course to her starboard.

ARTICLE VII.

That on the 30th day of June, 1944, this Honorable Court, by an order duly made and entered in the above-entitled cause, granted to your petitioners leave to file their Petition, under Rule 56 of the Supreme Court, impleading the said vessel Karl Leibknecht, as a respondent, in this Court, and

that heretofore process in due form of law has issued against said S. S. Karl Leibknecht, her engine, machinery, tackle, furniture, etc., and that heretofore the owners of the said Karl Leibknecht have filed in this cause a claim of Owner and a Stipulation to abide by and pay the Decree, including costs, in the sum of \$15,000.00.

ARTICLE VIII.

That heretofore, this Honorable Court made and entered its Order in the above-entitled cause, based upon the stipulation of the said libelants, and your petitioners, as claimants, which Order, eliminating its formal parts, is as follows:

“Now, Therefore, It Is Ordered that the claimants shall present to the court a bond for the sum of \$15,000, in due form of law, with sufficient surety to answer the exigencies of this cause, and upon the approval and filing of said \$15,000 bond, the said \$10,000 bond may be deemed canceled, held for naught and withdrawn from the files of this cause, and thereafter the said \$15,000 bond shall be in full force and effect for all purposes provided by the conditions of said bond and by law.

/s/ JAMES ALGER FEE,
Judge.

Dated this 11th day of July, 1944.”

That pursuant to said Order your petitioners, as claimants, presented to this Honorable Court the said bond in the sum of \$15,000.00, which bond was approved and filed herein.

ARTICLE IX.

That if the said Diesel Tug "Charles T," and your petitioners as owners and claimants of the said tug, are under [32] any liability by reason of any of the matters alleged in the said libel of the libelants, Ole Ericksen and Pacific Building Materials Company, a corporation, which liability your petitioners have heretofore denied, on information and belief, in their said Answer to the said Libel and in their Petition to bring in the said vessel S. S. Karl Leibknecht, and which liability your petitioners hereby deny on information and belief, then any and all such liability was caused by the fault or negligence of the said Willamette Tug and Barge Co., the said charterer and operator of the tug "Charles T" at the time and place of the collision set forth in libellant's libel, as heretofore alleged, and not by any fault or negligence of your petitioners, by reason whereof any and all said liability, if any, should be borne by the said Willamette Tug and Barge Company, and not by your petitioners; and that by reason of the premises the said Willamette Tug and Barge Company should be proceeded against directly in this Court in this suit.

ARTICLE X.

That your petitioners, as claimants and owners of the said Diesel Tug "Charles T" have heretofore incurred costs, disbursements and proctors' fees in defending the said libel, and will expend further sums for said purposes, which sums should be borne by the said Willamette Tug and Barge Com-

pany, the respondent herein, and not by your petitioners, and that the reasonable amounts expended and to be expended for the said purposes will not be less than Twelve hundred fifty (\$1250.00) Dollars.

ARTICLE XI.

That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioners pray that a citation in due form of law may issue against the said Willamette Tug and Barge Company, a corporation, the respondents herein, citing it to [33] appear and answer all and singular the matters and things in this petition and libel herein set forth, and that the respondent may be proceeded against as if originally made a party hereinto the amount sued for in the libel herein, and if this Honorable Court should find that the libelants are entitled to a decree, than that said decree be entered against the respondent herein, the Willamette Tug and Barge Company, a corporation; that your petitioners be awarded their costs, disbursements and proctors' fees incurred herein; and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

/s/ THOMAS J. WHITE,

/s/ SAMUEL H. BEAR,

Proctors for the Petitioners.

State of Oregon,
County of Multnomah—ss.

I, Esson Smith, being first duly sworn, depose and say: that I am a general partner and manager of the partnership of C. T. Smith and Esson Smith, doing business as C. T. Smith and Son; that I have read the foregoing petition, know the contents thereof, and the same is true to the best of my knowledge, except as to matters therein alleged on information and belief, and as to those matters, I believe it to be true.

/s/ ESSON H. SMITH.

Subscribed and sworn to before me this 24th day of July, 1944.

[Seal] /s/ ROBERT A. LEEDY,
Notary Public for Oregon.

My notarial commission expires on Oct. 15, 1945.

United States of America,
District and State of Oregon,
County of Multnomah—ss.

Due service of the within Petition to bring in the Willamette Tug and Barge Company, etc., is hereby accepted in Multnomah County, Oregon, this 2nd day of August, 1944, by receiving a copy thereof, duly certified to as such by Thomas J. White, of Attorneys for C. T. Smith and Esson Smith, doing business as C. T. Smith and Son.

/s/ MacCORMAC SNOW,
Proctor for Libelants.

/s/ ERSKINE WOOD,
Proctor for Claimant of the
Karl Liebeknecht.

[Endorsed]: Filed Aug. 4, 1944. [35]

[Title of District Court and Cause.]

ANSWER OF C. T. SMITH AND ESSON
SMITH, PARTNERS, DOING BUSINESS
AS C. T. SMITH AND SON, TO AMENDED
LIBEL, AS CLAIMANTS OF THE TUG
“CHARLES T”

To: The Honorables, the Judges of the District
Court of the United States for the District of
Oregon:

The Answer of C. T. Smith and Esson Smith,
partners doing business as C. T. Smith and Son,

claimants of the diesel tug "Charles T," as the same is proceeded against in rem upon the amended libel of Ole Ericksen and Pacific Building Materials Company, in a cause of towage, civil and maritime (filed on leave of court), alleges as follows:

I.

Claimants admit the allegations of Article I of the Amended Libel.

II.

Claimants deny any knowledge or information sufficient to form a belief of the allegations of Article II of the Amended Libel and call for proof thereof.

III.

Claimants admit that on or about June 2, 1944, at about 10:45 p.m., the Barge EK-9, with two other barges, was in tow of the Diesel Tug "Charles T"; that the crew of the said tug consisted of Charles Bates, Master, and Lloyd Chappell, deckhand; that at said time said tug was proceeding down the Columbia River, between Martin's Bluff and Deer [61] Island, opposite or a short distance below the green lighted buoy off said Martin's Bluff; that at said time and place a certain steamship known as the "Karl Liebknecht" (herein in the files of this cause sometimes spelled "Karl Leibkeneckt") was proceeding up the Columbia River; and that the said steamship collided with and caused some damage, the extent of which damage is unknown to claimants, to the said Barge EK-9. Fur-

ther answering, claimants, on information and belief, deny the other allegations of Article III of the Amended Libel.

IV.

Claimants deny any knowledge or information sufficient to form a belief as to the allegations of Article IV of the Amended Libel, and therefore call for strict proof of the same.

V.

Claimants admit the allegations of Article V of the Amended Libel.

VI.

Claimants admit the allegations of Article VI of the amended libel.

VII.

Claimants admit the allegations of Article VII of the Amended Libel.

VIII.

Claimants admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court and deny the other allegations of Article VIII of the Amended Libel.

IX.

Further answering the said amended libel, and as a [62] further and separate defense thereto, claimants, on information and belief, allege the true facts are as follows:

On or about the second day of June, 1944, at about 10:45 p.m. the Diesel Tug "Charles T," with

its crew consisting of Charles Bates, Master, and Lloyd Chappell, deckhand, had in tow the Barge EK-9 and two other barges. The said tug was at said time proceeding with the said tow down the Columbia River on her own starboard side of the channel, between Martin's Bluff and Deer Island, about opposite, or just below, the green lighted buoy off Martin's Bluff. At said time and place, the towing and all running lights of the said tug "Charles T," were lighted and the running lights on the said barges were lighted. While so proceeding, a vessel, which proved to be the "Karl Liebknecht," was observed proceeding up the Columbia River, whereupon the said tug "Charles T," keeping to her own starboard side of the channel, changed her course so as to approach closer to the (her) starboard bank of the river. The said vessel, "Karl Liebknecht," instead of keeping and pulling to her own starboard side of the channel, proceeded on a course so that her stem struck the Barge EK-9 a glancing blow amidships. The stem of the said vessel became locked with the said Barge and so remained until the engines of the said vessel were reversed and she backed down-river so as to clear the said Barge. The said Barge EK-9, and the other two barges of the said tow, carried by current of the river, then passed the said vessel starboard to starboard, the towline by which they had been towed having been broken during the accident. The said tug "Charles T" and the said vessel "Karl Liebknecht" passed port to port. [63]

X.

That said collision and consequent damage as may have been sustained by the said Barge EK-9 were not caused or contributed to by any fault or neglect on the part of the said Diesel Tug "Charles T" or those in charge of her, but were caused solely by the fault and negligence of the said SS "Karl Liebencht," her owners, operators and those in charge of her, in the following respects, among others:

1. She failed to keep a good lookout.
2. She failed to keep to her own starboard side of the channel.
3. She failed to sound passing or warning signals.
4. She failed to slow, stop, or reverse her engines when danger of collision was or should have been apparent.
5. After danger of collision was or should have been apparent she failed to take proper precautions to avoid collision.
6. She failed to alter her course to her starboard.

XI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, claimants pray this Honorable Court that the Amended Libel herein be dismissed, with costs.

/s/ TH. J. WHITE,

/s/ SAMUEL H. BEAR,

Proctors for Claimants of the
"Charles T."

State of Oregon,
County of Multnomah—ss.

I, Esson Smith, being first duly sworn, depose and say: that I am a general partner and Manager of the partnership of C. T. Smith and Esson Smith, doing business as C. T. Smith and Son, Claimants of the Diesel tug "Charles T"; that I have read the foregoing Answer to the Amended Libel, know the contents thereof, that the same is true to the best of my knowledge, except as to matters therein alleged on information and belief, and as to those matters, I believe it to be true.

/s/ ESSON H. SMITH.

Subscribed and sworn to before me this 26 day of September, 1944.

[Seal] /s/ A. M. MAPLE,

Notary Public for Oregon.

My notarial commission expires on 2/6/45.

State of Oregon,
County of Multnomah—ss.

Service of the within Answer to Amended Libel, by certified copy, at Portland, Oregon, this 27th day of September, 1944, is hereby admitted.

/s/MacCORMAC SNOW,
Of Proctors for Libelants.

/s/ ERSKINE WOOD,
Proctor for Respondent, SS
Karl Lieb knecht.

/s/ SENN & RECKEN,
Of Proctors for Respondent,
Willamette Tug and Barge
Company.

[Endorsed]: Filed Sept. 27, 1944. [65]

[Title of District Court and Cause.]

ANSWER OF WILLAMETTE TUG AND
BARGE COMPANY, A CORPORATION,
TO THE AMENDED LIBEL OF OLE
ERICKSEN AND PACIFIC BUILDING
MATERIALS COMPANY, A CORPORA-
TION

To: The Honorable the Judges of the District Court
of the United States for the District of Oregon:

The answer of Willamette Tug and Barge Com-
pany, a corporation, Respondent, to the amended
libel of Ole Ericksen and Pacific Building Materials
Company alleges as follows and says:

ARTICLE I.

Respondent admits Article I of the amended libel.

ARTICLE II.

Respondent denies any knowledge or information sufficient to form a belief of the allegations of Article II of the amended libel and calls for proof thereof.

ARTICLE III.

Respondent admits that on or about the 2nd day of June, 1944, at about 9:45 p.m. the said Barge "EK-9," with two other barges, was in tow of the diesel tug "Charles T." [66] That the crew of said tug consisted of Charles Bates, master, and Lloyd Chappell, deckhand. That at said time and place said tug was proceeding down the Columbia River between Martin's Bluff and Deer Island opposite or a short distance below the green lighted buoy off Martin's Bluff. That at said time and place a certain steamship known as "Karl Liebknecht" (herein in the files of this cause sometimes spelled "Karl Leibkeneckt") was proceeding up the Columbia River and that said steamship collided with and caused some damage to the Barge "EK-9." Further answering respondent denies the other allegations of said Article III.

ARTICLE IV.

Respondent denies any knowledge or information sufficient to form a belief of the allegations of Article IV of said amended libel and, therefore, calls for strict proof of the same.

ARTICLE V.

Respondent admits Article V of said amended libel.

ARTICLE VI.

Respondent admits Article VI of said amended libel.

ARTICLE VII.

Respondent admits Article VII of said amended libel.

ARTICLE VIII.

Respondent denies the allegations of Article VIII of said amended libel and denies all of the allegations of said amended libel, except wherein same are admitted and respondent, Willamette Tug and Barge Company, a corporation, does hereby require proof as to the truth of the allegations and articles set forth in said amended libel. [67]

Wherefore respondent, Willamette Tug and Barge Company, a corporation, prays that said amended libel may be dismissed with costs and that respondent may have such other, further and different relief as may be just and in accordance with the admiralty practice.

/s/ SENN & RECKEN.

GRIFFITH, PECK, PHILLIPS
AND NELSON.

SENN & RECKEN,

Proctors for Respondent, Willamette Tug and
Barge Company, a Corporation.

Service accepted this 5th day of October, 1944, by receipt of a duly certified copy thereof, as required by law.

/s/ WHITE & BEAR,

Proctors for Diesel Tug "Charles T" and C. T. Smith and Esson Smith.

/s/ ERSKINE WOOD,

Of Proctors for Steamship
"Karl Liebknecht."

State of Oregon,
County of Multnomah—ss.

I, Clarence D. Phillips, being first duly sworn, say that I am the Secretary of Willamette Tug and Barge Company, a corporation, Respondent in the within entitled action and that the foregoing Answer to amended libel is true as I verily believe.

/s/ CLARENCE D. PHILLIPS.

Subscribed and sworn to before me this 5th day of October, 1944.

[Seal] /s/ L. A. RECKEN,

Notary Public for Oregon.

My Commission Expires Jan. 15, 1945. [68]

State of Oregon,
County of Multnomah—ss.

Due service of the within Answer to Amended Libel is hereby accepted in Multnomah County, Oregon, this 5th day of October, 1944, by receiving a copy thereof, duly certified to as such by L. A. Recken, of Attorneys for Respondent.

/s/ MacCORMAC SNOW,

K

Attorney for Libelants.

[Endorsed]: Filed Oct. 5, 1944. [69]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated with respect to the second amended libel served and tendered for filing by the libelants, as follows:

1. All parties consent to the filing of said second amended libel.

2. C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son, as claimants of the tug "Charles T", and Willamette Tug and Barge Company, respondent, deny each and all of the allegations of negligence set forth in said second amended libel against said tug and its operators.

3. The Government Purchasing Commission of

the Soviet Union in the U. S. A., as claimant of the steamship "Karl Liebknecht", admits the said allegations of negligence charged in said second amended libel against the tug "Charles T".

/s/ MacCORMAC SNOW,

/s/ GUNTHER F. KRAUSE,

Proctors for Libelants. [70]

/s/ THOMAS J. WHITE,

/s/ SAMUEL H. BEAR,

Proctors for C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son.

/s/ L. A. RECKEN,

of Proctors for Respondent.

/s/ ERSKINE WOOD,

/s/ LOFTON L. TATUM,

Proctors for The Government Purchasing Commission of the Soviet Union in the U. S. A.

[Endorsed]: Filed Feb. 2, 1945.

[Title of District Court and Cause.]

SECOND AMENDED LIBEL

To the Honorable, the Judges of the District Court of the United States, for the District of Oregon:

The second amended libel of Ole Ericksen, owner of the Barge EK-9, and Pacific Building Materials Company, charterer of said barge, against the diesel tug "Charles T", in a cause of towage, civil and

maritime, filed on leave of court, alleges on information and belief as follows:

I.

During the times herein named the libelant Pacific Building Materials Company was and is a corporation organized and existing under the laws of the State of Oregon.

II.

During the times herein named the libelant Ole Ericksen was the owner and the libelant Pacific Building Materials Company was the charterer of that certain wooden cargo-carrying barge known as "EK-9". [71]

III.

On or about June 2, 1944, at about 9:45 P. M., the said Barge "EK-9", with two other barges, was in tow of the diesel tug "Charles T". The crew of said tug consisted of two, namely, Charles Bates, master, and Lloyd Chappell, deckhand. Said tug at said time was proceeding down the Columbia River between Martins Bluff and Deer Island, about opposite or a short distance below the green lighted buoy off Martins Bluff. At said time and place a certain steamship known as the "Karl Liebknecht" (herein in the files of this cause sometimes spelled "Karl Liebkeneckt") was proceeding up the Columbia River. The said parties in charge of the tug "Charles T" then and there failed to keep and maintain a proper lookout and failed to see or observe the approach of the said steamship, and failed to keep their said tow of barges out of the way of

said steamship. The said tug and her navigation, throughout all said maneuvers, was, as libelants are informed and believe and therefore say, in charge of an inexperienced deckhand who knew nothing about navigation or the channel or the beacons or river conditions, and as the vessels approached each other lost his head and did not know what to do. The master of said tug, so the libelants are informed and believe and therefore allege, was, during all the time until the collision was imminent, asleep, and the said collision was caused at least in part by the fault of the said deckhand in cutting across the bow of the "Karl Liebknecht" without blowing a passing whistle or without giving any warning whatever of what he was going to do. As a result of said faults on the part of the said [72] two parties in charge of the navigation of the said "Charles T", the said steamship collided with and damaged the said Barge "EK-9".

IV.

Libelants do not yet have complete information as to the nature of the damage to the Barge "EK-9" but allege on information and belief that the timbers of said barge were by the force of said collision broken, split and damaged to a great extent and that the reasonable cost of repairing said barge will be not less than the sum of \$15,000.00.

V.

The said tug "Charles T" was during the pendency of process hereunder within the District of

Oregon and within the jurisdiction of this Honorable Court. Since the filing of said libel the owners of the "Charles T" have filed their claim to the said tug and have filed a stipulation in the sum of \$15,000.00 to answer the exigencies of the said libel and of this second amended libel.

VI.

Since the filing of said libel the claimants C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son, owners of said diesel tug "Charles T", filed a petition under the 56th Admiralty Rule for the arrest of the steamship "Karl Liebknecht", and thereafter the owners of said steamship filed a claim to said vessel and a stipulation in the sum of \$15,000.00 to answer the exigencies of the libel herein and of this second amended libel. The libelants have filed and will file and answer to said petition in respect to the steamship "Karl Liebknecht". These libelants repeat and incorporate herein the admissions, denials and allegations [73] of the said answer and make the same a part of this second amended libel.

VII.

The said C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son, owners of the diesel tug "Charles T", also have filed a petition herein under the 56th Admiralty Rule to bring in and make a party respondent to this cause the Willamette Tug and Barge Company, a corporation. Libelants have filed and will file an answer to

the said petition. Libelants now repeat and incorporate herein the admissions, denials and allegations of their said answer to the said petition respecting Willamette Tug and Barge Company, and make the same a part of this second amended libel.

VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelants pray as follows:

1. That the diesel tug "Charles T", its bondsman and stipulator, be held to answer for the full amount of damages suffered by the libelants and each of them as a result of the collision alleged in this second amended libel, together with interest thereon and costs;
2. That the impleaded steamship "Karl Liebknecht", her bondsmen and stipulators, be held to answer for the full amount of damages suffered by the libelants as a result of the collision alleged in this second amended libel;
3. That the judgment to be awarded libelants and each of them against the diesel tug "Charles T", her bondsman and stipulator, shall be in no respect stayed or minimized through the operation of the [74] the judgment to be awarded the libelants and each of them against the steamship "Karl Liebknecht", her bondsmen and stipulators.
4. That in the event this Honorable Court shall award the libelants and each or either of them a sec-

ondary judgment against the Willamette Tug and Barge Company by reason of the matters and things set forth in the aforesaid petition against the Willamette Tug and Barge Company, and the answer of the libelants thereto, any such judgment shall not have the effect of staying or minimizing the judgment to be awarded the libelants and each of them against the diesel tug "Charles T", its bondsman and stipulator.

5. Libelants further pray for such other and further relief as may be just and equitable.

(Seal) /s/ MacCORMAC SNOW,
 /s/ GUNTHER F. KRAUSE,
 Proctors for Libelants.

United States of America,
District of Oregon—ss.

I, Ole Ericksen, being first duly sworn, depose and say that I am one of the libelants herein, and that the foregoing second amended libel is true as I verily believe.

/s/ OLE ERICKEN.

Subscribed and sworn to before me this 29th day of January, 1945.

(Seal) /s/ MacCORMAC SNOW,
Notary Public for Oregon.

My Commission expires: Sept. 28, 1948.

Service of the within second amended libel is hereby admitted this 29th day of January, 1945.

/s/ SAMUEL H. BEAR,

Of Proctors for C. T. Smith and Esson Smith, Co-partners Doing Business as C. T. Smith and Son.

/s/ LOFTON L. TATUM,

Of Proctors for the Steamship "Karl Liebknecht", her Claimants and Stipulators.

/s/ SENN & RECKEN BY BS,

Proctors for Respondent Willamette Tug and Barge Company.

[Endorsed]: Filed in open court Jan. 29, 1945.

[Title of District Court and Cause.]

PRE-TRIAL ORDER
ADMITTED FACTS

1. During the times named herein, Pacific Building Materials Company and Willamette Tug and Barge Company were and are Oregon corporations, and C. T. Smith and Esson Smith were co-partners doing business as "C. T. Smith and Son". The said corporations are sometimes hereinafter referred to as the "Pacific" and "Willamette" Companies, respectively, and the said partnership under its partnership name. During the times named herein, The Government Purchasing Commission of the Soviet Union in the U. S. A., sometimes hereinafter referred to as the "Purchasing Commission", was and is an agency of the United Soviet Socialist Republics, a sovereign, and is entitled to the sole possession of the steamship "Karl Liebknecht".

2. During the times named herein, C. T. Smith and Son were and are owners of the diesel tug "Charles T", and the Purchasing Commission was and [76] is the claimant of the steamship "Karl Liebknecht".

3. On or about June 2, 1944, at about 9:45 P. M.; or 10:45 P. M., the Barge "EK-9" with two other barges was in tow of the diesel tug "Charles T" and the flotilla was proceeding down the Columbia River in the vicinity of Martins Bluff and Deer Island. At said time and place the steamship "Karl Liebknecht" was proceeding up the Columbia River and a collision occurred between the steamship "Karl

Lieb knecht" and the Barge "EK-9". As a result of said collision the libelants claim that said barge was damaged.

ALIGNMENT OF THE PARTIES

4. On or about June 9, 1944, libelants filed their libel against the said tug "Charles T", in rem, charging that said collision occurred through the negligence of the operators of said tug, and that said Barge "EK-9" was damaged in the amount of \$10,000.00. With said libel libelants filed their stipulation for costs, in due form of law, in the amount of \$250.00, with General Casualty Company as surety. On or about August 22, 1944, libelants filed an amended libel claiming damages in the amount of \$15,000.00 to said barge.

5. On or about June 14, 1944, C. T. Smith and Son filed their claim to the tug "Charles T", in due form of law, and prayed to defend this suit. Thereafter, by stipulation and agreement of the said two parties, C. T. Smith and Son filed their bond, in due form of law, to abide by and pay the decree, and for costs, in the sum of \$15,000.00, with General Casualty Company as surety thereon. On or about June 16, 1944, C. T. Smith and Son, [77] as claimant of the tug "Charles T", filed their answer to said libel denying the charges of negligence against said tug. By stipulation the said denials are made to extend to each and all of the charges of negligence against said tug and its operators set forth in the said second amended libel.

6. On or about June 14, 1944, C. T. Smith and Son filed their petition to bring into this cause the steamship "Karl Lieb knecht", and therein charged that the collision occurred through the negligence of the operators of the said steamship, in the particulars alleged in said petition. With the said petition C. T. Smith and Son filed their stipulation for costs, in due form of law, with General Casualty Company as surety. This court by order of June 30, 1944, allowed said petition. The clerk thereupon issued a warrant of arrest against the steamship "Karl Lieb knecht", and the Purchasing Commission on or about June 30, 1944, filed its claim in due form of law to said steamship and its bond to abide by and pay such decree as might be awarded against it, together with costs, in the sum of \$15,000.00, with United States Fidelity & Guaranty Company as surety.

7. On or about August 4, 1944, C. T. Smith and Son filed their petition against the Willamette Company charging that because of certain contractual arrangements between said two parties, the Willamette Company was liable for the damage caused to the Barge "EK-9", if such damage was caused by any negligence on the part of the tug "Charles T", and praying that if libelants are entitled to a decree, that decree should be awarded against the Willamette Company, and that C. T. Smith and Son be awarded their costs, disbursements proctor's [78] fees and other relief. With said petition C. T.

Smith and Son filed their stipulation for costs, in due form of law, with General Casualty Company as surety. This court on August 4, 1944, made an order directing that citation issue against the Willamette Company. Such citation issued and the Marshal duly served the Willamette Company with the same.

8. On August 22, 1944, the libelants answered the petition of C. T. Smith and Son to bring in the "Karl Liebknecht" by admitting the allegations of negligence against the "Karl Liebknecht" set forth therein, and thereupon prayed that if this court should find the "Karl Liebknecht" negligent in any of the particulars alleged, it should award libelants judgment against the bondsman of the "Karl Liebknecht" as well as against the bondsman of the tug "Charles T". On August 22, 1944, libelants answered the petition of C. T. Smith and Son against the Willamette Tug and Barge Company by denying knowledge and information concerning the details of the contractual arrangements between C. T. Smith and Son and the Willamette Company and praying that in the event this court should award them a secondary judgment against the Willamette Company by reason of the matters and things set forth in said petition, any such judgment should not have the effect of minimizing or staying the responsibility of the tug "Charles T" or its bondsman on account of the damage to said barge.

9. On or about September 2, 1944, the Willamette Company filed its answer to the petition of C.

T. Smith and Son denying responsibility for [79] the acts of those on board the tug "Charles T", and denying liability for any damage sustained by Barge "EK-9".

10. The Purchasing Commission filed its answer to the petition of C. T. Smith and Son, denying the charges of negligence made in said petition against the steamship "Karl Liebknecht" and asserting negligence on the part of the operators of the tug "Charles T" in the particulars alleged in said answer.

11. On February 2, 1945, libelants filed a second amended libel in which, in addition to the charges of negligence which libelants set forth against the tug "Charles T" in their libel and amended libel, libelants charged negligence against said tug in the same language as the Purchasing Commission used in its answer to the petition of C. T. Smith and Son against the "Karl Liebknecht".

ALLEGATIONS AND CONTENTIONS OF LIBELANTS

12. Libelants allege and contend that Ole Erickson and the Pacific Company were, respectively, the owner and charterer of the Barge "EK-9", and were and are jointly and severally interested in any recovery which may be made herein by reason of the damage to said barge. C. T. Smith and Son, the Willamette Company and the Purchasing Commission deny this allegation and put libelants to the proof thereof.

13. The libelants have alleged and do now allege and contend that the collision was proximately caused and contributed to by the following acts of negligence on the part of those in charge of the navigation of the tug "Charles T" and those in charge of the navigation of the "Karl Liebknecht", namely:

14. At and before the time and place of the collision, those in charge of the navigation of the tug "Charles T" failed to keep and maintain a proper lookout [80] and failed to see or observe the approach of the steamship "Karl Liebknecht", and failed to keep their said tow of barges out of the way of said steamship. The said tug and her navigation, throughout all said maneuvers, was, as libelants are informed and believe and therefore say, in charge of an inexperienced deckhand who knew nothing about navigation or the channel or the beacons or river conditions, and as the vessels approached each other lost his head and did not know what to do. The master of said tug, so the libelants are informed and believe and therefore allege, was, during all the time until the collision was imminent, asleep, and the said collision was caused at least in part by the fault of the said deckhand in cutting across the bow of the "Karl Liebknecht" without blowing a passing whistle or without giving any warning whatever of what he was going to do. As a result of said faults on the part of the said two parties in charge of the navigation of the said

“Charles T”, the said steamship collided with and damaged the said Barge “EK-9”.

15. The parties in charge of the navigation of the “Karl Liebknecht” at and before the time and place of the collision were negligent in the following respects, among others:

(1) She failed to keep a good lookout.

(2) She failed to keep to her own starboard side of the channel.

(3) She failed to sound passing or warning signals.

(4) She failed to slow, stop, or reverse her engines when danger of collision was or should have been apparent.

(5) After danger of collision was or should have been apparent she failed to take proper precautions to avoid collision.

(6) She failed to alter her course to her starboard. [81]

16. As a result of said collision the Barge “EK-9” was damaged and made less valuable by the following items:

Cost to towage	\$ 38.00
Cost of repairs	8,877.10
Permanent depreciation	5,000.00
Supervision of repairs by	
Ole Ericksen	700.00
Interest on the above amounts from	
date of collision, June 2, 1944.	

Allegations and Contentions of C. T. Smith and Son,
the Purchasing Commission and the Willamette
Company

17. C. T. Smith and Son deny the allegations and contentions set forth in paragraphs 14 and 16 of this pre-trial order but admit those of paragraph 15 hereof. C. T. Smith and Son deny that the operators of the tug "Charles T" were guilty of any fault causing or contributing to the collision but contend that the collision was caused solely by the faults of the operators of the "Karl Liebknecht", as set forth in paragraph 15 hereof. As to the damage to the Barge "EK-9" caused by said collision, C. T. Smith and Son put libelants to the proof thereof.

18. The Purchasing Commission denies the allegations and contentions set forth in paragraphs 15 and 16 of this pre-trial order but admits those of paragraph 14 hereof. The Purchasing Commission denies that the operators of the "Karl Liebknecht" were guilty of any fault causing or contributing to the collision but contend that the collision was caused solely by the faults of the operators of the "Charles T", as set forth in paragraph 14 hereof. As to the damage to the Barge "EK-9" caused by said collision, the Purchasing Commission puts libelants to the proof thereof. [82]

19. The Willamette Company denies the allegations and contentions set forth in paragraphs 14 and 16 of this pre-trial order but admits those of paragraph 15 hereof. The Willamette Company

denies that the operators of the tug "Charles T" were guilty of any fault causing or contributing to the collision, but contend that the collision was caused solely by the faults of the operators of the "Karl Liebknecht", as set forth in paragraph 15 hereof. As to the damage to the Barge "EK-9" caused by said collision, the Willamette Company puts libelants to the proof thereof.

20. As between C. T. Smith and Son and the Willamette Company, C. T. Smith and Son charge that at and before the time and place of the collision they did charter, transfer and deliver to the Willamette Company the entire custody, management and control of the "Charles T", including the entire command and control over its management; that the Willamette Company was the operator of the tug "Charles T"; and that the master and deckhand of said tug, to-wit, Charles Bates and Lloyd Chappell, respectively, were at said time and place servants and agents of the Willamette Company and not of C. T. Smith and Son. The Willamette Company on the other hand contends that at and before the time and place of the collision the said master and deckhand of the tug "Charles T" were agents and servants of C. T. Smith and Son and not of the Willamette Company. The Willamette Company further contends that the contract between C. T. Smith and Son and the Willamette Company under which the said tug was operating at and before the time and place of the collision was an ordinary contract of towage wherein the tug and its owners assumed the usual duties and obligations of the tower in such towage contract. [83]

21. Both C. T. Smith and Son and the Willamette Company concede that if the court should hold that the collision and damage to the Barge "EK-9" were caused or contributed to by faults on the part of the operators of the tug "Charles T", the judgment of this court should go against the bondsman of the tug "Charles T" to the extent the court determines.

22. In the event that the court should hold that the collision was caused or contributed to by any fault or faults on the part of the operators of the tug "Charles T" and should thereby enter a judgment against the General Casualty Company under said bond for damages to the Barge "EK-9", C. T. Smith and Son contend and claim that the Willamette Company should be required by the decree of the court to hold them harmless and to indemnify them in respect to their duty and obligation to indemnify the General Casualty Company. The Willamette Company denies that it is under any duty or obligation to indemnify C. T. Smith and Son as above recited, and denies that the decree of this court should impose upon it any such requirement.

AGREEMENTS ON THE LAW

23. All of the parties agree on the law of the case to the following extent:

24. If the court finds and concludes that the damage to the Barge "EK-9" was proximately caused by the sole fault of the operators of the tug "Charles T", or any of them, a judgment in favor of the libelants should be entered against the bondsman of the tug "Charles T".

25. If the court finds and concludes that the damage to the Barge "EK-9" was proximately [84] caused by the sole fault of the operators of the "Karl Liebknecht", or any of them, a judgment in favor of libelants should be entered against the bondsman of the "Karl Liebknecht".

26. If the court finds and concludes that the damage to the Barge "EK-9" was proximately caused or contributed to by faults on the part of the operators of the tug "Charles T", or any of them, and the operators of the "Karl Liebknecht", or any of them, a judgment should be entered in favor of the libelants against the bondsman of the tug "Charles T" and the bondsman of the "Karl Liebknecht". In such an event, the judgment in favor of libelants should be in the full amount against each of said bondsmen, jointly and severally, with only one satisfaction, however, in favor of the libelants and with rights of contribution as between said bondsmen in equal shares to each.

27. If as between the Willamette Company and C. T. Smith and Son the court should hold that the Willamette Company was the operator of the tug "Charles T" at and before the time and place of the collision and assumed the duties, obligations and liabilities of such operation, and, in addition, if the court holds that the damage to the Barge "EK-9" was proximately caused or contributed to by the fault of the operators of the "Charles T", or any of them, then and in such event a judgment in favor of the libelants should be entered against the Willamette Company, in personam, in addition to the

judgment against the bondsman of the tug "Charles T" and against the bondsman of the "Karl Liebknecht", if such bondsmen should also be liable under the principles described in paragraph 26 of this pre-trial order. Such judgment should be entered in the [85] full amount against each and any of said parties who may be thus liable, with only one satisfaction, however, and such judgment should protect and enforce the appropriate rights of contribution between those held liable. Such a judgment should further provide that as between the Willamette Company and C. T. Smith and Son, the Willamette Company should be held liable to indemnify C. T. Smith and Son and the bondsman of the tug "Charles T" in respect to such amounts as either or any of them might be called to pay to or for the libelants under such a judgment.

QUESTIONS TO BE DETERMINED

28. Was the collision proximately caused or contributed to by the fault or faults of the operators of the tug "Charles T", or any of them, in any of the particulars set forth in paragraph 14 of this pre-trial order?

29. Was the collision proximately caused or contributed to by the fault or faults of the operators of the "Karl Liebknecht", or any of them, in any of the respects named in paragraph 15 of this pre-trial order?

30. As between the Willamette Company and C. T. Smith and Son, which party was the operator of

the tug "Charles T" at and before the time and place of the collision, and which party assumed the duties and obligations and liabilities of such operation?

31. What was the extent of the damage suffered by the Barge "EK-9", and what is the amount of the recovery therefor?

32. Are libelants, or either of them, entitled to recover if damage is found under paragraph 31 above? [86]

33. In what manner should costs be assessed or apportioned, and should C. T. Smith and Son recover their proctor's fees from the Willamette Company?

EXHIBITS IDENTIFIED UPON PRE-TRIAL

Libelants' Exhibit 1 for identification, navigation chart Columbia River.

Libelants' Exhibit 2 for identification, navigation chart Columbia River.

Libelants' Exhibit 3 for identification, survey report.

Libelants' Exhibit 4 for identification, O.P.A. ceiling prices, Klepp Marine Ways.

Libelants' Exhibit 5 for identification, corrected invoice, Klepp Marine Ways.

Libelants' Exhibit 6 for identification, invoice, services and barge depreciation, Ole Ericksen.

Libelants' Exhibit 7 for identification, blueprint showing wracking of barge.

Libelants' Exhibit 8 for identification, photograph of barge damage.

Libelants' Exhibit 9 for identification, Willamette Tug & Barge Company tow bill.

Libelants' Exhibit 9A Contract F.

Claimant Purchasing Commission's Exhibit 10, being deposition of Z. F. Ivashin and V. S. Zamaitin.

Stipulation on certain facts between C. T. Smith and Son and Willamette Company—Exhibit 11.

Respondent Willamette Tug and Barge Company's Exhibit 12—check No. A-680.

Respondent Willamette Tug and Barge Company's Exhibit 13—duplicate of check with statement of account.

Respondent Willamette Tug and Barge Company's Exhibit 14—statement of C. T. Smith and Son under date of June 22, 1944.

This pre-trial order represents the result of pre-trial conferences between the parties, their proctors and the Judge presiding in open court. This order supersedes the pleadings, which have no further [87] function in this case, and shall not be changed after signature or during trial except by agreement of the parties and the court or on order of the court, to prevent manifest injustice. June 20th, 1945.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed June 20, 1945. [88]

[Title of District Court and Cause]

OPINION

December 29, 1945

James Alger Fee, District Judge:

Upon the issue between claimants and respondent as to whether the agreement was for a demise or a simple affreightment, the contract was oral. The usual construction of such an agreement is against a demise. There are some circumstances which strengthen this view such as the fact that master and crew were employees of claimants. But this is overridden by the fact that respondent gave orders directly affecting management of tug and tow in navigation, placed its own pilots aboard under certain circumstances, and generally assumed control thereof. On the particular journey, the master was directed how to handle the tug and tow and was furnished with a bridle for the purpose of towing astern. The tug was ordered to take the tow below Longview. This respondent could do because its license from the Interstate Commerce Commission [89] permitted this with its own boats or those under demise, whereas claimants' license would not permit such a movement. Construing the contract as the parties did by these acts, there was a demise. But whatever the original idea for this journey, at least the full responsibility was taken by respondent. For that journey at least, there was a

charter pro hac vice and complete control by the respondent.

As to damages, the court allows:

Cost of towage, which is admitted, \$38.00.

Cost of repairs, \$8,877.10.

Some of these items are questioned, but the testimony seems to support the amount as reasonable.

Libellants are entitled to be made whole.

Permanent depreciation, \$1,500.00.

An owner's opinion (estimate of \$5,000) is subject to criticism. It is not binding upon the trier of the fact. The amount of damage and the testimony as to the weakening justify the court in assessing a reasonable amount as permanent damage.

Supervision of repairs, \$700.00.

This could have been done by libelant or another. In either event it should be paid for. It lessened the amount of the permanent damage.

Findings may be prepared.

[Endorsed]: Filed Jan. 14, 1946.

[90]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT.

I.

Libelants Ole Ericksen and the Pacific Building Materials Company, a corporation, are respectively the owner and charterer of the Barge "EK-9," and

are jointly and severally interested in any recovery which may be made herein by reason of the damage to said barge.

II.

At and before the time and place of the collision, those in charge of the navigation of the tug "Charles T" failed to keep and maintain a proper lookout and failed to see or observe the approach of the steamship "Karl Liebknecht," and failed to keep their said tow of barges out of the way of said steamship. The said tug and her navigation was in charge of an inexperienced deckhand who knew nothing about navigation or the channel or the [91] beacons or river conditions, and as the vessels approached each other lost his head and did not know what to do. The master of said tug was, during all the time until the collision was imminent, asleep, and the said collision was caused in part by the fault of the said deckhand in cutting across the bow of the "Karl Liebknecht" without blowing a passing whistle or without giving any warning whatever of what he was going to do.

III.

The acts and failures described in the preceding paragraph of those in charge of the navigation of the tug "Charles T" were negligent and were the proximate cause of the collision.

IV.

The parties in charge of the navigation of the "Karl Liebknecht" at and before the time and place

of the collision failed to keep a good lookout; failed to keep to their own starboard side of the channel; failed to sound passing or warning signals; failed to slow, stop or reverse their engines when danger of collision was or should have been apparent; failed to alter their course to their starboard in order to avoid a collision.

V.

The acts and failures of those in charge of the navigation of the "Karl Liebknecht" were negligent and were the proximate cause of the collision.

VI.

As a result of said collision the Barge "EK-9" was damaged and made less valuable by the following items: cost of towage, \$38.00, cost of repairs \$8,877.10, permanent depreciation, \$1500.00, supervision of repairs by Ole Ericksen, \$700.00, Total \$11,115.00; with interest at six per cent per annum on the above amounts from and after date [92] of repairs, July 28, 1944.

VII.

At and before the time and place of the collision, the claimants of the tug "Charles T", C. T. Smith and Esson H. Smith, copartners doing business as C. T. Smith and Son, did charter, transfer, and deliver to the Willamette Tug and Barge Company, the entire custody, management and control of the tug "Charles T", including the entire command and control over its navigation; that during these times the tug "Charles T" was engaged in moving com-

modities aboard non-self-propelled vessels in interstate commerce, and made trips below Longview, Washington, which movements could not have been performed under the Interstate Commerce Commission operating authority of C. T. Smith and Son, whose certificate was limited to performing general towage only to, and not below, Longview, Washington; that the said Willamette Tug and Barge Company operated the said tug under authority contained in its certificate from the Interstate Commerce Commission which authorized both the movements of commodities on non-self-propelled vessels with the use of separate towing vessels and general towing to points on the Willamette River below Portland and on the Columbia River below Vancouver, and invoiced its customers in its own name and not in the name of C. T. Smith and Son for the towage movements performed by the said tug; and, on this particular voyage, the Willamette Tug and Barge Company directed the master of the tug how to handle the tug and tow, and furnished a bridle for the purpose of towing astern. The Willamette Tug and Barge Company was the charterer and operator of the tug "Charles T", and the master and deckhand of the said tug, [93] to-wit: Charles Bates and Lloyd Chappell, respectively, were at said time and place servants and agents of the Willamette Tug and Barge Company.

CONCLUSIONS OF LAW.

(1) The collision was proximately caused by the combined faults of the navigators of respectively

the Tug "Charles T", and the steamship "Karl Lieb knecht."

(2) The Willamette Tug and Barge Company, as charterer pro hac vice of the tug "Charles T" was and is responsible for the faults of the navigators of the Tug "Charles T."

(3) The Libelants jointly and severally are entitled to a decree for the full amount of their damages, together with the interest against each of the following named parties: C. T. Smith and Esson H. Smith, claimants of the Tug "Charles T" and General Casualty Company, as surety on behalf of the Tug "Charles T," the Government Purchasing Commission of the Soviet Union in the U. S. A. and United States Fidelity & Guaranty Company, as claimant and surety for the Steamship "Karl Lieb knecht," and the Steamship "Karl Lieb knecht" and the Willamette Tug and Barge Company; but libelants together are entitled to only one satisfaction of said decree.

(4) As between the Steamship "Karl Lieb knecht" and the claimant and bondsmen thereof on the one hand, and the Willamette Tug and Barge Company on the other hand, said parties shall finally pay, divide and bear equally between them, the judgment of the libelants and the whole thereof.

(5) C. T. Smith and Son and their bondsmen are entitled to a judgment against the "Karl Lieb knecht," [94] its claimant and bondsmen, for any amount they may be required to pay of the libelant's

judgment over one-half thereof and are entitled to a judgment against the Willamette Tug and Barge Company for the entire amount of the libelant's judgment which they may be required to pay.

(6) Willamette Tug and Barge Company is entitled to a judgment against the "Karl Liebknecht," its claimant and bondsmen, for any amount it may be required to pay of the libelant's judgment over one-half thereof.

(7) The "Karl Liebknecht," its claimant and bondsmen, are entitled to judgments against the Willamette Tug and Barge Company and C. T. Smith and Son, for any amount they may be required to pay of the libelant's judgment over one-half thereof.

Dated March 11th, 1946.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed March 11, 1946.

[95]

In the District Court of the United States
For the District of Oregon

No. Civil 2489

OLE ERICKSEN and PACIFIC BUILDING
MATERIALS COMPANY, a corporation,
Libelants,

vs.

DIESEL TUG "CHARLES T", C. T. SMITH and
ESSON H. SMITH, co-partners doing busi-
ness as C. T. SMITH AND SON, Claimants
of the Tug "CHARLES T", WILLAMETTE
TUG AND BARGE COMPANY, a corpora-
tion,

Respondent,

Steamship "KARL LIEBKNECHT".

FINAL DECREE

This cause came on for trial on the 22nd day of June, 1945. The libelant, Ole Ericksen, appeared in person and by his proctor, Gunther F. Krause. The libelant, Pacific Building Materials Company, appeared by its general manager, Frank Pene-packer, and by its proctor, MacCormac Snow. The claimant, C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, appeared by its manager, Esson H. Smith, and by its proctors, Thomas J. White and Samuel H. Bear. The Government Purchasing Commission of the Soviet Union in the U.S.A. appeared by its proc-tors, Erskine Wood and Lofton L. Tatum. The

Willamette Tug and Barge Company appeared by its general manager, Arthur A. Riedel, and its proctor, L. A. Recken. The Court heard the testimony and examined the exhibits, adduced and brought into Court by the parties and heard the arguments and examined the briefs of the respective proctors. The Court being then advised did render an opinion and did enter Findings of Fact and Conclusions of Law covering the contested issues of fact and law.

Now, Therefore, It Is Considered, Ordered, Adjudged and Decreed as follows:

1. The libelants shall jointly and severally have and recover of and from C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, and General Casualty Company, claimants and bondsmen of the Tug "Charles T", and The Government Purchasing Commission of the Soviet Union in the U.S.A. and United States Fidelity & Guaranty Company, claimants and bondsmen of the Steamship "Karl Liebknecht", and the Steamship "Karl Liebknecht" and Willamette Tug and Barge Company, an Oregon corporation, and each of them, the full sum of \$11,115.10, with interest thereon at six per cent per annum from and after July 28, 1944.

2. Libelants between them shall, however, have only one satisfaction of this judgment.

3. C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, and General Casualty Company, claimants and bondsmen of the Tug "Charles T", shall have and recover of and

from the Government Purchasing Commission of the Soviet Union in the U.S.A. and the United States Fidelity & Guaranty Company, claimants and bondsmen of the Steamship "Karl Liebknecht" and the Steamship "Karl Liebknecht", such amount as they may be required to pay of the judgment of the libelants hereinbefore set forth over one-half thereof and shall have and recover of and from Willamette Tug and Barge Company the entire amount of the said libelants' judgment which they may be required to pay.

4. Willamette Tug and Barge Company shall have and recover of and from the Government Purchasing Commission of the Soviet Union in the U.S.A. and United States [97] Fidelity & Guaranty Company, claimants and bondsmen of the Steamship "Karl Liebknecht" and the Steamship "Karl Liebknecht", such amount as said Willamette Company may be required to pay of the judgment in favor of the libelants above set forth over one-half thereof.

5. The Government Purchasing Commission of the Soviet Union in the U.S.A. and the United States Fidelity & Guaranty Company, claimant and bondsmen of the Steamship "Karl Liebknecht" and the said Steamship "Karl Liebknecht", shall have and recover of and from Willamette Tug and Barge Company and C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, and General Casualty Company, claimants and bondsmen of the Tug "Charles T", such amount as they may be required to pay of the judgment in

favor of the libelants above set forth over one-half thereof.

6. Let the Clerk issue and lodge with the Marshal of this Court such appropriate Writs of Execution as will carry this judgment into full force and effect.

Dated March 11th, 1946.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed March 11, 1946. [98]

[Title of District Court and Cause.]

PETITION FOR APPEAL

Willamette Tug and Barge Company, a corporation, Respondent, being aggrieved by the final decree, rulings and findings of the District Court in the above entitled cause, claims an appeal from said decree, rulings and findings.

On this appeal the Respondent, Willamette Tug and Barge Company, a corporation, desires only to review the following questions:

1. The District Court of the United States for the District of Oregon erred in holding and decreeing that the Libelants should recover from the Respondent Willamette Tug and Barge Company the repairs by Ole Erickson, one of the Libelants. Resum of \$1500.00 permanent depreciation, and the spondent does not claim any error or contend that

the court erred in awarding to Libelants the cost of repairing the barge, but does contend that the item for permanent depreciation and supervision of repairs should not be allowed.

2. The District Court of the United States for the District of Oregon erred in holding and decreeing that at the time and [99] place of the collision between the "Karl Liebknecht" and the Barge "EK-9" being towed by the Tug "Charles T", that the Claimants C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, did charter, transfer and deliver to the Willamette Tug and Barge Company the entire custody, management and control of the Tug "Charles T", including the entire command and control of its navigation; and the holding that the Willamette Tug and Barge Company was the charterer of the Tug "Charles T" and that the master and deckhand of the said "Charles T", to-wit: Charles Bates and Lloyd Chappell, respectively, were at the time of the collision servants and agents of the Willamette Tug and Barge Company, a corporation; and in holding and decreeing that the Willamette Tug and Barge Company is and was a charterer pro hac vice of the Tug "Charles T" and that the said Respondent Willamette Tug and Barge Company was and is responsible for the faults of the navigators of the Tug "Charles T".

Petitioner does not desire to review the findings and decree of the District Court of the United States for the District of Oregon wherein said court held and decreed that the Steamship "Karl

Liebcknecht" and the Diesel Tug "Charles T" were jointly and equally responsible for the collision.

Petitioner prays that its appeal may be allowed.

Dated this 8th day of June, 1946.

WILLAMETTE TUG AND
BARGE COMPANY,

By /s/ L. A. RECKEN,
Its Proctor.

The foregoing petition and the appeal therein prayed for are hereby allowed.

.....

United States District Judge.

Due and regular service of the foregoing petition for appeal and order of allowance are hereby accepted this 10th day of June, 1946.

/s/ MacCORMAC SNOW,
Of Proctors for Libelants Ole Ericksen and Pacific
Building Materials Company.

/s/ THOMAS J. WHITE,

/s/ SAMUEL H. BEAR,

Proctors for C. T. Smith and
Esson H. Smith.

/s/ LOFTON L. TATUM,

Of Proctors for Steamship
"Karl Liebcknecht".

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Lowell Mundorff, Clerk, and Thomas J. White and Samuel Bear, Proctors for Claimants C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, and Erskine Wood, Proctor for Steamship "Karl Liebknecht" and Gunther F. Krause and MacCormac Snow, Proctors for Libelants Ole Erickson and Pacific Building Materials Company, a corporation,

Sirs:

Please take notice that the Willamette Tug and Barge Company, a corporation, Respondent in the above entitled cause hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this court entered herein on the 11th day of March, 1946; and said Willamette Tug and Barge Company only desires to review on appeal the following questions: [102]

1. The District Court of the United States for the District of Oregon erred in holding and decreeing that the Libelants should recover from the Respondent Willamette Tug and Barge Company the sum of \$1500.00 permanent depreciation, and the further sum of \$700.00 on account of supervision of repairs by Ole Ericksen, one of the Libelants. Respondent does not claim any error or contend that the court erred in awarding to Libelants the cost of repairing the barge, but does contend that the item

for permanent depreciation and supervision of repairs should not be allowed.

2. The District Court of the United States for the District of Oregon erred in holding and decreeing that at the time and place of the collision between the "Karl Liebknecht" and the Barge "EK-9" being towed by the Tug "Charles T", that the Claimants C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, did charter, transfer and deliver to the Willamette Tug and Barge Company the entire custody, management and control of the Tug "Charles T", including the entire command and control of its navigation; and the holding that the Willamette Tug and Barge Company was the charterer of the Tug "Charles T" and that the master and deckhand of the said "Charles T", to-wit: Charles Bates and Lloyd Chappell, respectively, were at the time of the collision servants and agents of the Willamette Tug and Barge Company, a corporation; and in holding and decreeing that the Willamette Tug and Barge Company is and was a charterer pro hac vice of the Tug "Charles T" and that the said Respondent Willamette Tug and Barge Company was and is responsible for the faults of the navigators of the Tug "Charles T". [103]

Dated June 6, 1946.

Respectfully,

/s/ SENN & RECKEN,

Proctors for Willamette Tug
and Barge Co., Respondent.

Due and regular service of the foregoing Notice of Appeal is hereby accepted this 8th day of June, 1946.

/s/ MacCORMAC SNOW,

Proctors for Libelants Ole Erick-
sen and Pacific Building Ma-
terials Company.

/s/ THOMAS J. WHITE,

/s/ SAMUEL K. BEAR,

Proctors for C. T. Smith and
Esson H. Smith.

/s/ LOFTON L. TATUM,

Proctors for Steamship "Karl
Liebknecht".

The within appeal is hereby allowed this.....
day of June, 1946.

.....,
United States District Judge for the District of
Oregon.

[Endorsed]: Filed June 10, 1946. [104]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The Willamette Tug and Barge Company, respondent, hereby assigns errors in the proceedings, decisions and decree of the United States District Court for the District of Oregon as follows:

1. In holding that the libelants shall recover from the respondent, Willamette Tug and Barge Company, an Oregon corporation, the full sum of \$11,115.10 with interest thereon at 6% from and after July 28, 1944.

2. In holding that C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, shall have and recover of and from Willamette Tug and Barge Company the entire amount of the libelants' judgment which C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, may be required to pay.

3. In finding that at and before the time and place of the collision between the "Karl Liebknecht" and the barge "EK-9" being towed by the tug "Charles T", that the said C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, [105] did charter, transfer and deliver to the Willamette Tug and Barge Company the entire custody, management and control of the tug "Charles T", including the entire command and control of its navigation; and in holding that the Willamette Tug and Barge Company was the charterer of the Tug "Charles T" and that the master and deckhand of the said tug "Charles T", to-

wit: Charles Bates and Lloyd Chappell, respectively, were at the time of the collision servants and agents of the Willamette Tug and Barge Company, a corporation; and in holding that the Willamette Tug and Barge Company is and was a charterer pro hac vice of the tug "Charles T", and that said Willamette Tug and Barge Company was and is responsible for the faults of the navigators of the tug "Charles T".

4. In finding and holding that the barge "EK-9" was damaged and made less valuable by the following items: permanent depreciation, \$1500.00, supervision of repairs by Ole Ericksen, \$700.00.

5. In failing to hold that under all of the facts and evidence in this case, the Willamette Tug and Barge Company, a corporation, and the said C. T. Smith and Esson H. Smith were engaged in nothing more than a contract of affreightment, and that the said C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, retained full control, supervision and management of the Tug "Charles T".

6. In failing to decree that the Willamette Tug and Barge Company, a corporation, was entitled to a decree of dismissal herein and a judgment as against the said C. T. Smith and Esson H. Smith for its costs and disbursements.

Respectfully,

/s/ SINN & RECKEN,

Proctors for Willamette Tug
and Barge Company, Re-
spondent. [106]

Due and regular service of the foregoing Assignment of Errors is hereby accepted this 10th day of June, 1946.

/s/ MacCORMAC SNOW,
Of Proctors for Libelants Ole Erickson and Pacific
Building Materials Company.

/s/ THOMAS J. WHITE and
SAMUEL H. BEAR,
Proctors for C. T. Smith and
Esson H. Smith.

/s/ LOFTON L. TATUM,
Of Proctors for Steamship
"Karl Liebkecht".

[Endorsed]: Filed June 10, 1946. [107]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, that we, Willamette Tug and Barge Company, an Oregon corporation, as principal, and Glens Falls Indemnity Company of Glens Falls, New York, a corporation, as surety, and licensed in Oregon to become surety on bonds and undertakings, are held and firmly bound unto Ole Ericksen and Pacific Building Materials Company, a corporation, and C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, in the full and just sum of \$15,000.00, to be paid to the said Ole Ericksen and Pacific Building Materials Company, a corporation, and to C. T. Smith and Esson H. Smith, co-partners

doing business as C. T. Smith and Son, their executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of June in the year of our Lord One Thousand Nine Hundred and Forty-six.

Whereas, lately at a District Court of the United States for the District of Oregon in a suit pending in said Court, between [109] Ole Ericksen and Pacific Building Materials Company, a corporation, as Libelants, and Diesel Tug "Charles T", C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, claimants of the Tug "Charles T", and Willamette Tug and Barge Company, a corporation, as Respondent, and the Steamship "Karl Liebknecht," a decree and judgment was rendered against the said Willamette Tug and Barge Company, a corporation, and the said Willamette Tug and Barge Company, a corporation, having filed in said Court a notice of appeal to reverse the judgment and decree in the aforesaid suit, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Willamette Tug and Barge Company, a corporation, shall prosecute said appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay,

if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal]

WILLAMETTE TUG AND
BARGE COMPANY a Corporation,

By /s/ ARTHUR A. RIEDEL,
President,
Principal.

GLENS FALLS INDEMNITY
COMPANY of Glens Falls, New
York,

By /s/ J. STUART LEAVY,
Surety.

Countersigned:

JEWETT, BARTON, LEAVY
and KERN,

By /s/ J. STUART LEAVY,
Resident Agents. [110]

Due and regular service of the foregoing Supersedeas Bond on appeal is hereby accepted this 10th day of June, 1946.

/s/ MacCORMAC SNOW,

Of Proctors for Libelants Ole Ericksen and Pacific Building Materials Company.

/s/ THOMAS J. WHITE and
SAMUEL H. BEAR,

Proctors for C. T. Smith and
Esson H. Smith.

/s/ LOFTON L. TATUM,

Of Proctor for Steamship
"Karl Liebknecht".

[Endorsed]: Filed June 10, 1946. [111]

[Title of District Court and Cause.]

DESIGNATION OF APOSTLES ON APPEAL

The undersigned, Willamette Tug and Barge Company, a corporation, Respondent and Appellant, hereby designates the following as apostles on appeal to the United States Circuit Court of Appeals of the Ninth Circuit, to-wit:

- (a) The style of the Court.
- (b) The names of all of the parties.
- (c) The libel with all exhibits annexed thereto.

(d) The pleadings of the libelants and claimants and respondent, together with the exhibits thereto.

(e) The testimony taken on the part of the libelants and claimants and respondent, and all exhibits not annexed to the pleadings.

(f) The pre-trial order of this Court, and the opinion of this Court determining the liability of each of the parties and the damages; the final findings of fact, conclusions of law and final decree dated March 11, 1946.

(g) The petition for and order allowing appeal, assignment of errors, citation, supersedeas bond and praecipe for apostles. [118]

Due and regular service of the foregoing designation of Apostles on Appeal is hereby accepted this 10th day of June, 1946.

/s/ MacCORMAC SNOW,
Of Proctors for Libelants Ole Erickson and Pacific
Building Materials Company.

/s/ THOMAS J. WHITE,
/s/ SAMUEL H. BEAR,
Proctors for C. T. Smith and
Esson H. Smith.

/s/ LOFTON L. TATUM,
Of Proctors for Steamship
"Karl Liebknecht".

And the undersigned, Willamette Tug and Barge Company, a corporation, does hereby request the

Clerk of the District Court of the United States for the District of Oregon to prepare and issue the above Apostles on Appeal.

WILLAMETTE TUG AND
BARGE COMPANY,
A Corporation.

By /s/ SENN & RECKEN,
Its Proctors.

[Endorsed]: Filed June 10, 1946. [119]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 123 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2489, in which Willamette Tug and Barge Company, a corp. is respondent and appellant and Ole Ericksen and Pacific Building Materials Co. a corp.,; Diesel Tug "Charles T"; C. T. Smith and Esson Smith, co-partners dba C. T. Smith and Son, Claimants of the Tug "Charles T", and Steamship "Karl Liebknecht" are appellees; that said transcript has been prepared by me in accordance with the designation

of contents of the record on appeal filed by the appellants and counter designation of Apostles on Appeal filed by C. T. Smith and Esson Smith, and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation and counter designation, as the same appears of record and on file at my office and in my custody.

I am also inclosing herewith transcript of proceedings dated June 20, 21 and 22, 1946, and original exhibits 1 to 3 and 5 to 14 inclusive.

I further certify that the cost of comparing and certifying the within transcript is \$71.45 and that the same has been paid by said appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of July, 1946.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy Clerk. [123]

[Title of District Court and Cause.]

PROCEEDINGS

Friday, June 22, 1945, at the hour of 10:10 o'clock a.m., the trial of the above-entitled cause was resumed and continued as follows:

The Court: You may proceed, gentlemen.

Mr. White: Captain Bates.

CHARLES RICHARD BATES

was thereupon recalled as a witness in behalf of the Claimants herein and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. White:

Q. You have previously testified in this matter that you were the Captain of the Charles T.

A. Yes.

Q. Captain, who paid your salary?

A. Esson Smith.

Q. When? Was it during all the times that you were working on the boat? A. Yes.

Q. Do you recall the instructions that Mr. Smith gave you when the boat was sent to the Willamette Tug and Barge Company?

A. Oh, he told me to take and run the Charles T. to Portland, told me how to get the Willamette Tug and Barge, and when I got there I was to take orders from them——

Mr. Recken: Just a moment. Your Honor, we object to that as [211] not binding on the Respondent, Willamette Tug and Barge Company, because we weren't there. This is a conversation between the Smiths and this man. It would be self-serving and would not be binding on us.

Mr. White: If the Court please,——

(Testimony of Charles Richard Bates.)

The Court: Well, anyhow, I will hear the testimony, subject to the objection.

Mr. White: Proceed.

A. Well, when I got there I was to take further orders from the Willamette Tug and Barge; they had the rest—we was just to go to there and they give the rest of the orders, that was all.

Q. What date was that?

A. Well, I don't know exactly what date it was.

Q. Prior to the collision approximately how long was it? A. Oh, a month, anyway.

Q. A month, anyhow? A. Yes.

Q. Now, during that period from the time that you took the boat to the Willamette Tug and Barge Company to the time of the collision who did you take your instructions from?

A. The company, you mean? I took it from the dispatcher of Willamette Tug and Barge, and once in a while from Mr. Riedel.

Q. How were these orders given to you?

A. Well, some of it was given orally and some of them they wrote it out on a little piece of paper, where I was to go. [212]

Q. Did they tell you how to do your work, in addition to where to go?

A. Why, yes, in a way they did, told us where to go and how to—once in a while they would tell us which way to go, like down through the slough if they was having a trial run on the river there with ships.

(Testimony of Charles Richard Bates.)

Q. They would tell you what channels to use, is that right? A. Yes.

Q. Did you ever do any miscellaneous work, such as furnishing supplies for Willamette Tug and Barge Company's other boats?

A. Doing what?

Q. Did you ever get, say, any oil drums for other boats of the Willamette Tug and Barge?

A. Yes, we have run over to the oil docks and brought over a barrel of oil for the barge, and stuff like that, just run around and——

Q. Now, during this period the boat was—pardon me, I will reframe my question. Where was the boat kept during this period when not in use?

A. At their moorage, tied up at their moorage.

Q. At whose moorage?

A. The Willamette Tug and Barge.

Q. Was the boat during that period ever at the moorage of C. T. Smith and Son?

A. No, it was not. [213]

Q. Where is their moorage?

A. C. T. Smith and Son, you mean?

Q. Yes. A. It is at Stevenson, Washington.

Q. Did you during that period ever receive any orders concerning the navigation of the boat or any other orders pertaining to the Tug Charles T. from Esson Smith or C. T. Smith?

A. No, I never.

Q. Now, on the day of the collision, when you were preparing the boat to tow the three barges,

(Testimony of Charles Richard Bates.)

one of which was involved in the collision, did the officials of the Willamette Tug and Barge Company give you any special orders relative to the making up of the tow?

A. Well, they told us to take them down on a towline, and asked us if we had a bridle, and we never had no bridle, so they says get the one they had on the Henry J. That is one of their own tugs.

Q. They furnished you the towing bridle?

A. Yes.

Q. How do you usually move barges?

A. Push them on the bow of the boat, on one side.

Q. And who gave you these orders to use a towing bridle?

A. Howard Brands, I believe the name was, Mr. Howard Brands.

Q. And who was he?

A. He was a dispatcher for the Willamette Tug and Barge. [214]

Q. Now, during the time that you were towing for the Willamette Tug and Barge where did you go on the river?

A. Oh, we ran from Portland harbor to Longview and to Beaver and to Vancouver.

Q. Where is Beaver?

A. Twelve miles below Longview by river.

Q. Is Beaver in Oregon? A. Oregon.

Q. Now, Mr. Bates, in going from Portland to Beaver is it necessary to cross the thread of the

(Testimony of Charles Richard Bates.)

channel in making that tow or in moving barges?

A. What do you mean by the thread of the channel?

Q. The middle of the channel of the river.

A. Oh, yes, we would go across the river several times back and forth from the Oregon side.

Q. And did you go back and forth several times from the Washington side to the Oregon side on those particular runs you made down to Beaver?

A. Yes.

Q. Now, after the collision who did you report to?

A. I called Art Riedel's residence. It was late at night. His wife answered and he wasn't there or something, and then I guess she had notified the dispatcher, and he called me back then to have me explain what happened.

Q. And did he give you any instructions? [215]

A. Yes; he says to bring the other barges back up that we went down after.

Q. And who is Art Riedel that you just mentioned?

A. I don't know. He is the boss or owner or something of the Willamette Tug and Barge.

Mr. White: I have no further questions.

Cross-Examination

By Mr. Recken:

Q. Captain, you never knew the Willamette Tug and Barge prior to April of 1944, did you?

(Testimony of Charles Richard Bates.)

A. That is when we first went to work for them.

Q. And you brought the Charles T. down to the Willamette Tug and Barge moorage?

A. Yes.

Q. And isn't it a fact that on different occasions you tied up at the oil docks over night?

A. No, not no oil dock.

Q. You were never tied up at the oil docks?

A. No.

Q. Did you never make any trips up to Stevenson?

A. With the tug?

Q. Yes.

A. No.

Q. Or go up there during the week days, in April or May?

A. Oh, I went through there to go home to The Dalles. I live in [216] The Dalles. On a week-end I went up through there.

Q. You went up to Stevenson to get groceries, did you?

A. Yes.

Q. Did you do your cooking on the boat?

A. Yes.

Q. Who furnished the food?

A. Smith did.

Q. Who furnished the gasoline?

A. Didn't use no gasoline.

Q. Or the Diesel oil? It is a Diesel engine, isn't it?

A. Mr. Smith furnished the Diesel.

Q. And isn't it a fact that all they told you at different times when they had a tow that you were

(Testimony of Charles Richard Bates.)

to take the tow to a certain place? That was all the orders that were given you?

A. From the Willamette Tug and Barge, you mean?

Q. Yes. A. Yes.

Q. Tell you to go to one place and pick up a barge and take it down there?

A. Well, they would tell us where to take it to, and once in a while they would tell us what to do with it, where to go.

Q. They never told you how to navigate the boat or at what speed to travel or what to do?

A. No; that is,—

Q. Uh, huh,—and you were in full custody of that boat, weren't [217] you, as skipper—

A. Yes.

Q. —and master of the Charles T.? You were the only one that had the control of that?

A. I had the running of it.

Mr. Recken: I think that is all.

Mr. Tatum: No questions.

Redirect Examination

By Mr. White:

Q. Captain, did the Willamette Tug and Barge Company ever furnish one of their pilots to go on the boat?

A. Yes, when they told us to go down the slough, why, I had never been down the slough before, and they furnished a captain to go down.

Mr. White: I think that is all.

(Testimony of Charles Richard Bates.)

Mr. Recken: No further questions.

Mr. White: That is all.

(Witness excused.)

Mr. White: Mr. Chappell. [218]

LLOYD CHAPPELL,

was thereupon recalled as a witness in behalf of the Claimants herein and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. White:

Q. Mr. Chappell, did you hear the testimony of Captain Bates? A. Yes, sir.

Q. Were you present when the dispatcher of the Willamette Tug and Barge Company informed Mr. Bates, the day of the accident, to use a bridle?

A. Yes, I was.

Q. In towing the three barges?

A. I was there.

Q. You will confirm Mr. Bates' testimony?

A. Yes.

Mr. White: That is all I have.

Cross Examination

By Mr. Recken:

Q. Now, just a moment, Mr. Chappell,—

A. Yes.

Q. In fact, the only thing was that the barges were to be taken in tandem, weren't they?

(Testimony of Lloyd Chappell.)

A. Yes, sir.

Q. And, of course, that was the only way to take them that way, with a bridle tow, wasn't it?

A. Well,——

Q. Or do you know?

A. All I know is that Mr. Bates claimed that it was much easier to push them, that is all.

Mr. Recken: That is all.

Redirect Examination

By Mr. White:

Q. Mr. Chappell, how did you usually move barges with the Charles T.?

A. Well, usually pushed them.

Q. Did you always push them? Do you recall any other instance when you towed them?

A. Well, that is the only time that I remember when we didn't push them.

Mr. White: I have no further questions.

Recross Examination

By Mr. Recken:

Q. Just a minute, Mr. Chappell. That is the only time that you ever did have three barges, however, at one time, isn't it?

A. Well, I couldn't say definitely, but I think we have pushed that many.

Mr. Recken: That is all.

Mr. White: That is all.

(Witness excused.)

Mr. White: Captain Smith. [220]

ESSON H. SMITH,

was thereupon produced as a witness in behalf of the Claimants herein and, having been first by the Court duly sworn, was examined and testified as follows:

The Court: Give your name to the reporter.

A. Esson H. Smith.

Direct Examination

By Mr. White:

Q. Where do you reside, Mr. Smith?

A. Stevenson, Washington.

Q. What is your business?

A. Log towing and general—I have general towing rights from—I.C.C. rights from Alderdale to Longview, Washington.

Q. What company do you work for?

A. C. T. Smith and Son.

Q. What is the legal status of that company?

A. Pardon?

Q. What is the legal status of that company?

A. It is a partnership between my father and myself. I am the operating manager.

Q. How many boats do you operate?

A. Four.

Q. And how long has C. T. Smith been engaged in the towing business? A. Since 1933.

Q. Do you operate a boat yourself?

A. Quite frequently. [221]

Q. Does your firm have any barges?

A. No.

(Testimony of Esßon H. Smith.)

Q. Do you have any authority to carry commodities on barges?

A. No, I have no authority to carry—the fact is, I have no authority to go below Longview and no authority to carry commodities on barges.

Q. And when you say “authority” do you mean Interstate Commerce authority? A. Yes.

Q. Now, have you operated vessels on the Columbia River between Portland and Beaver, Oregon?

A. Not to—not to Beaver, but I have been further down the river than Beaver towards Astoria.

Q. Now, how many times have you so operated a vessel, over what period?

A. Well, I would say I have been over the river a couple of dozen times.

Q. Now, would it be possible, Mr. Smith, to take a—excuse me, I didn't mean possible, but in the ordinary course of towing a vessel between Portland and Beaver would it be possible—is it usual for such a vessel to pass on each side of the thread of the channel?

A. Well, generally in the operation of a boat you cross the thread of the channel. However, it would be possible to go all the way on one side, but not probable. [222]

Q. Did you represent your firm in making arrangements with the Willamette Tug and Barge for the use of the Tug Charles T.? A. I did.

Q. Please tell, in your own words, the circum-

(Testimony of Esson H. Smith.)

stances leading up to the making of the contract and the actual occurrence of the contract.

A. About thirty days before the boat went down there I had a conversation with Mr. Riedel over the phone in regard to the charter of the boat and he said that we would get together at a later date, and on April 4, 1945, I went to Mr. Riedel's office—rather, he called me two days before that, that he wanted the boat the next day, and I went down to his office and talked to him about it and we agreed that he would charter the boat and I would pay all operating expenses connected with it, Diesel oil and lube oil and groceries, wages, and that I was to take 80 per cent. of the gross revenue earned by the boat; Willamette Tug and Barge were to do all the collections, make all the collections, make all the billings, and pay on the 10th of the following month.

Q. Now, was that your contract or agreement with Willamette Tug and Barge concerning the use of this vessel? A. It was.

Q. Now, did you know what the Willamette Tug and Barge Company was going to do with this tug?

A. No. I had a general idea as to what they were going to do. I wouldn't say that I did know each move that they were going to [223] make. I knew that they were going to handle barges with it.

Q. You knew the general nature of the busi-

(Testimony of Esson H. Smith.)

ness of the Willamette Tug and Barge Company?

A. Yes.

Q. Now, how long was the tug under charter to the Willamette Tug and Barge Company?

A. Approximately two months.

Q. And where was the tug kept during that period? Was it in their possession?

Mr. Recken: Well, just a moment. That is a conclusion, your Honor.

Mr. White: I agree with counsel.

The Court: Yes.

Mr. White: I withdraw the question.

The Court: Where was it kept?

Mr. White: Q. Where was the tug kept?

A. Well, in Mr. Riedel's and our conversation, that tug was to be kept at his dock, at their moorage, because he said that his boats were kept at Tracey's moorage and he would be on a par with Portland Tug & Barge and other operators in that zone on the charges. In other words, if his boats ran from one zone to another it would cost the customer more, so he specifically stated that he wanted that boat kept at his moorage.

Q. Was that part of the agreement?

A. Yes. [224]

Q. Now, during the period that the Willamette Tug and Barge Company had this tug, the Charles T., did you ever inspect the boat or look at the boat?

A. I never was aboard it until the day it left Portland.

(Testimony of Esson H. Smith.)

Q. What instructions did you give Captain Bates concerning the use of this tug by the Willamette Tug and Barge Company?

Mr. Recken: We will enter our same objection, your Honor.

The Court: I will take the testimony, subject to the objection.

Mr. Recken: Yes.

Mr. White: Answer the question, please.

A. I told Mr. Bates to take the boat to the Willamette Tug and Barge's moorage and that he would receive his instructions there.

Q. Now, did you ever give Mr. Bates any instructions concerning the operation or navigation of this tug—— A. No.

Q. Excuse me—during the time that the Willamette Tug and Barge had the tug? A. No.

Mr. White: I have no further questions.

Cross-Examination

By Mr. Recken:

Q. Mr. Smith, was there anything said as to how much revenue you were to get from it, from——

A. I was to take 80 per cent. of the amount that the boat earned. [225]

Mr. Recken: Mr. Clerk, will you hand the witness the exhibit, Pre-Trial Exhibit 12, I believe,—it is a check and also counterfoil; I believe they are both attached to one, your Honor, Exhibit 12, the check—or what one is that?

The Clerk: 12 is the check.

(Testimony of Esson H. Smith.)

Mr. Recken: And the counter, the copy. I believe they are both together.

Q. I wish you would examine that check and also the copy. A. Yes.

Q. And it is noted on there that it is for towage, isn't it, for the month of April?

Mr. White: If the Court please, I will object to that question on the same ground that Mr. Recken previously objected to my question. These are checks of the Willamette Tug and Barge Company. It has their writing thereon. They are nothing more than self-serving declarations.

The Court: Received, subject to the objection.

Mr. Recken: Q. Is that correct?

A. This is a check written out by Willamette Tug and Barge Company to C. T. Smith and Son in the amount of *dollars*, and the invoice says "For Towing." However, that is their writing, and at that time there was no trouble between Willamette Tug and Barge and Smith and Son, and I accepted the money.

Q. Well, you cashed the check?

A. That is right. [226]

Q. Before the 10th of May, knowing that it was for towage, and you made no objection whatsoever to that, did you? A. I cashed the check.

Q. You never complained to Mr. Riedel or any Willamette Tug and Barge official that that was incorrect or wrong?

A. Well, I don't see that the wording of a bill written by—

(Testimony of Esson H. Smith.)

Q. Just a moment. I asked you if you made any objection. A. I didn't make any objection.

Mr. White: If the Court please, I object to that question because it calls for a legal conclusion of this witness.

The Court: Overruled.

Mr. White: The witness is not a lawyer.

The Court: Overruled.

Mr. Recken: Will you answer the question?

The Court: He has already.

Mr. Recken: Oh. Mr. Bailiff, will you get the other exhibit,—I think it is 13.

The Clerk: Fourteen?

Mr. Recken: Fourteen? Yes.

Q. I hand you Pre-Trial Exhibit No. 14 and ask what that is?

A. It is a bill rendered by C. T. Smith and Son to Willamette Tug and Barge Company for \$2654.67, which they have not paid.

Q. And that bill was made up by C. T. Smith and Son on the log which was furnished to you by your captain?

A. This bill was made up by going—I had a copy of the log made [227] by my captain and I went to the dispatcher at the Willamette Tug and Barge Company's office and went over the moves with him to see that we had the right amount of moves and that I got the right amount of dollars out of the job. Willamette Tug and Barge never at any time gave me a copy of any of their billings or anything else. I had no way to find out

(Testimony of Esson H. Smith.)

how much money they owed me other than the log.

Mr. Recken: At this time, your Honor, I want to offer in evidence Pre-trial Exhibits No. 12 and No. 13. Your Honor, I was mistaken, I called them 12, but 12 and 13, that's the check and copy of the full check and the stub.

Mr. White: No objection.

The Court: Admitted by stipulation.

(The documents referred to, so offered and received, having been previously marked for identification on pre-trial conference, were thereupon marked received as Respondent's Exhibits 12 and 13.)

RESPONDENT'S EXHIBIT No. 12

Towing for the month of April, 1944,

by Towboat "Charles T" 1764.20

Less 20% as Agreed 352.84 \$1411.36

Check A 680

Willamette Tug and Barge Company

Portland, Oregon, May 10, 1944.

Voucher in Favor of C. T. Smith & Son \$1411.36

Entered IR-42.

(Testimony of Esson H. Smith.)

RESPONDENT'S EXHIBIT No. 13

Willamette Tug and Barge Company
Dredging-Towing and Barging

Portland, Oregon, May 10, 1944.

Pay to the Order of C. T. Smith & Son \$1411.36
(1411.36) Dollars.

To East Side Branch The First National Bank of
Portland, 612 Southeast Morrison Street, near
Grand Avenue. 24-69 Portland, Oregon 24-69.

Willamette Tug and Barge Company
Special Fund

/s/ ARTHUR A. RIEDEL,
President.

[Stamped]: Pay to the Order of Bank of Ste-
venson, for Deposit Only, C. T. Smith & Son.

Mr. Recken: And I also offer in evidence Ex-
hibit No. 14, pre-trial exhibit.

Mr. White: No objection.

The Court: Admitted by stipulation.

(The document referred to, so offered and
received, having been previously marked for
identification on pre-trial conference, was there-
upon marked received as Respondent's Ex-
hibit 14.) [228]

(Testimony of Esson H. Smith.)

RESPONDENT'S EXHIBIT No. 14

C. T. Smith & Son
Towing, Barging, Pile Driving
Stevenson, Washington
June 22, 1944

Willamette Tug & Barge Co.
Ft. of N. Portsmouth
Portland, Oregon

Balance due from April \$ 117.50

May	2	\$ 117.50
	3	10.00
	4	37.00
	5	109.00
	6	40.00
	7	30.00
	8	10.00
	9	70.00
	10	74.00
	11	170.00
	12	58.00
	13	87.50
	14	50.00
	15	97.00
	16	147.50
	17	192.50
	19	156.25
	20	92.50
	22	137.50
	23	178.75

(Testimony of Esson H. Smith.)

	24	\$ 76.00	
	25	137.50	
	26	82.50	
	29	213.50	
	30	186.50	
	31	240.25	
June	2	96.25	
	3	144.40	
		<hr/>	
		\$3041.90	
		.80	
		<hr/>	
		\$2433.5200	2433.52
			<hr/>
	Total Due		\$2654.47

Mr. Recken: That is all.

Mr. White: No questions.

(Witness excused.)

Mr. White: If the Court please, at this time the owners of the Charles T. and the Willamette Tug and Barge Company have entered into a stipulation, through their proctors, "That the towage movements performed by the tug 'Charles T.' during the period from April 5, 1944, to and including June 2, 1944, whenever invoiced to customers of Willamette Tug and Barge Company, were invoiced in the name of Willamette Tug and Barge Company and had no reference to C. T. Smith and Son." That

is Pre-trial Exhibit No. 11, and I would like to offer that in evidence.

Mr. Recken: We stipulated on that, your Honor, so it may be received.

The Court: Received.

(The stipulation referred to, so offered and received, having been previously marked for identification on pre-trial conference as C. T. Smith and Son's Exhibit 11, was thereupon marked received as C. T. Smith and Son's Exhibit 11.)

DEFENDANTS' EXHIBIT No. 11

In the District Court of the United States
for the District of Oregon

No. Civil 2489

OLE ERICKSEN and PACIFIC BUILDING
MATERIALS COMPANY, a corporation,
Libelants,

vs.

DIESEL TUG "CHARLES T," C. T. SMITH
and ESSON SMITH, co-partners doing business as C. T. SMITH AND SON, Claimants
of the Tug "CHARLES T," WILLAMETTE
TUG AND BARGE COMPANY, a corporation,

Respondent,

STEAMSHIP "KARL LIEBKNECHT."

STIPULATION

It Is Stipulated by and between the respective proctors for C. T. Smith and Son and Willamette Tug and Barge Company, that the towage movements performed by the tug "Charles T" during the period from April 5, 1944, to and including June 2, 1944, whenever invoiced to customers of Willamette Tug and Barge Company, were invoiced in the name of Willamette Tug and Barge Company and had no reference to C. T. Smith and Son.

/s/ SAMUEL H. BEAR,

Of Proctors for C. T. Smith
and Son.

/s/ L. A. RECKEN,

Of Proctors for Willamette
Tug and Barge Company.

[Endorsed]: Filed June 22, 1945.

Mr. White: That concludes our case, with the exception that I would like to make reference in the record to two reports of the Interstate Commerce Commission, Volume 250 at page 812. At page 812, under Docket No. W-425, is the operating authority of C. T. Smith and Son, contract carrier application. On page 818 [229] of the same volume, under Docket No. W-643, is the operating authority of the Willamette Tug and Barge Company, common carrier application.

That concludes our case.

Mr. Recken: I would like to call Captain Campbell. He will be a short witness. [230]

ARTHUR A. RIEDEL,

was thereupon recalled as a witness in behalf of Willamette Tug and Barge Company, Respondent, and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Recken:

Q. Now, Mr. Riedel, you are the General Manager of the Willamette Tug and Barge Company?

A. Yes, sir.

Q. How many tugs do you have that you own?

A. We own five, and then we give out a lot of towing to other boats.

Q. And when did you first meet Mr. Smith, the owner——

A. Well, I don't remember just exactly, but I had seen him at some meetings here about a year or so ago.

Q. Well, how did it come about that he did this work for you?

A. Well, here is the way I remember it, that he called me up and heard that I had more towing than I could do, and so I told him yes, and he said he would like to take some of it on, and so he wrote me a letter telling me that he would do it for 90 per cent., and I told him we had to wait so long for our money and so much trouble in the billing that I wouldn't go for ninety but for 80 per cent., give him twenty and me eighty (sic), and he take the tows, just like anybody else, when there are any

(Testimony of Arthur A. Riedel.)

to take. He asked me if I thought that he could make six or seven hundred dollars. [235] I told him that we had a lot of towing and that if he tied up where it was handy—of course, I always get a boat—they want them at the ships, they call and want them right now, and if he was handy, why, he could do pretty well.

Q. How did it happen that he tied up at the——

A. Well, there was a few times that he tied up some place else, but I told him if he tied up there where it was handy he could get more tows, because when a tow comes in we give it to the one that is ready right now, or the next one that is handy. For instance, St. Helens, or Kensley (?), Johnny Redding, and fellows like that, they do the same thing, and when they have a tow and we have to do the billing they kick back with 10 per cent. or 20 per cent.

Q. Mr. Riedel, was there at any time anything said about charter between you and Smith relative to this?

A. No, in our conversation Smith never said a word about charter at all. I asked him about insurance and things which I ask everyone that does towing for me, and he said okeh, and I said that was good enough for me.

Q. Did he ever at any time inform you where his rights in towing were?

A. No, he never did. I have seen him up at different meetings and I supposed that he had them. I didn't check into it. I supposed that he had been

(Testimony of Arthur A. Riedel.)

an old-timer on the river and he could take care of that. [236]

Q. Now, did you give orders to Captain Bates?

A. Well, here is the only thing, an order would come in, if our boats wasn't there and his happened to be there, why, I would take and tell the Captain he had a barge to go so and so and it was up to him if he wanted to take it; if he didn't want to take it we would get the next handiest man, because we had to be there as soon as possible.

Q. Did your organization do any work on the Tug Charles T.?

A. No, sir, none whatever.

Q. Did you pay the employees?

A. No, sir. The only time—there was a time or two when the boys would beat it up to Stevenson to get their groceries, and there was times when they were a little short of money and they made a person-to-person loan from the bookkeeper; the bookkeeper give them a receipt and give it to them out of petty cash; and then there was times, when they would get a check, they would come in and pay it. They always paid their bills.

Q. Did you ever furnish any oil or lube?

A. No, sir, we had nothing to do with that. I didn't even know what dock they got their oil at, never noticed or paid any attention.

Q. Now, the statement of Mr. Smith to the effect that you wanted the boat kept at your moorage?

A. I didn't care if it was kept there. If it was kept there they made it a little handier for me,

(Testimony of Arthur A. Riedel.)

and I have got nine hundred foot of space there and one more boat wouldn't have made any difference. [237]

Q. In your conversation with Mr. Smith when this towage arrangement was made was there anything said by you to Mr. Smith as to whether he could do other towing for other people?

A. No, sir, it didn't make a bit of difference to us. If he wasn't there we called Johnny Redding, Johnny White, Kensley, St. Helens, Shaver sometimes, even had Smith at Rainier,—just called on the one that was handiest to get the job done as soon as possible.

Q. Well, the question I asked you, did you have any conversation with Mr. Esson Smith to the effect that even though he was tied at your dock he could take other tows?

A. I told him if there was any tows came up it was jake with me, all I wanted to do was to get my work done, if he wasn't there I would get somebody else, because everyone on the river there works for us that is handy.

Q. And how many different ones tow for you?

A. Well, there's about six or seven or eight, and 'most all but and kicks back at 10 or 20 per cent., because we have to do the billing and sometimes we have to wait three or four months for our money and sometimes have to borrow money to pay our bills.

Q. The question was asked you yesterday on the stand as to who towed the barge to Rainier after the collision and you said Smith.

(Testimony of Arthur A. Riedel.)

A. Yes, that is Smith of Rainier. That is Wilbur Smith.

Q. It wasn't this Smith?

A. No, it was Wilbur Smith. I think Mr. Bates tied up to the jetty and Wilbur Smith came along a couple of days later and towed it down to the shipyard. [238]

Mr. Recken: You may cross examine.

Cross-Examination

By Mr. White:

Q. For what customer or customers mostly did the Charles T. do work?

A. Well, mostly for the War Department, the Treasury Department, and the Navy, and Moore-McCormick.

Q. And, generally speaking, where did the Tug Charles T. go for you?

A. Well, it was in Portland harbor most of the time, and once in a while went to Longview, and I think on two or three or four occasions probably went to Beaver.

Q. Who did the billing to the customer for these movements?

A. Well, they—he turned in—I got Captain Bates our log, as I would like to see it on our forms, and he said, "Well, I want to copy it on our own logs, copy for Mr. Smith," and I said, "That's fine" and we would do the billing. We do the billing on all the boats that works for us.

(Testimony of Arthur A. Riedel.)

Q. You do the billing to the customer?

A. Yes, sir.

Q. And is there any reference to either C. T. Smith and Son or the tug Charles T. on this billing to the customer?

A. Here's the way we do: We take and put the name of the boat on that we do the towing for, because we have to put the horsepower down, because oftentimes on an hourly basis, why, you have got to put the size of the boat in order to make the right charge.

Q. But there is no reference to who owns that boat on the billing, is there?

A. No, sir.

Q. And the billing, I presume, has the heading showing the Willamette Tug and Barge Company?

A. That is right.

Q. Now, what was the nature of the work that the Charles T. performed? Was it towing or pushing barges, or—

A. Just the same as—I just gave him the orders the same as anybody else, "There's a tow if you want it." "Okeh." "If you have got time", and so forth—or "Towing barges"—that's about all.

Q. They did tow or push barges?

A. Well, we told him there was a tow and they could push or pull, whatever they wanted to. I never tell a man how to hook on. The captain is supposed to know that.

Q. Lets take a neutral ground: Did the Charles T. move barges for you during this period?

(Testimony of Arthur A. Riedel.)

A. Yes.

Q. Now, what were these barges loaded with?

A. Most of them were loaded with lend-lease equipment for Russia.

Q. Now, were some of these movements between Portland, Oregon and Longview, Washington?

A. Yes, sir.

Q. Now, your firm has I.C.C. operating authority to move commodities on non-self-propelled vessels, has it not?

A. Yes, sir, that is right.

Q. Now, does Mr. Smith have such operating authority, to your knowledge?

A. Well, I figured Mr. Smith, he knew what the work was. He came down there and heard we couldn't take care of all our towing, and I naturally supposed if he was towing that he had the authority, or if he didn't he wouldn't take them.

Q. Did you know also that Mr. Smith's towing authority only goes to Longview, Washington?

A. No, I didn't know that. I figure a man knows what he has got, and if he didn't have authority to go there that is up to him.

Q. Now, what authority publishes your rates, Mr. Riedel?

A. Well, you know more about that than I do,—that Columbia River Tariff Bureau.

Q. Are you a member of the Columbia River Tariff Bureau?

A. Yes, sir.

Q. Do they publish your tariffs?

(Testimony of Arthur A. Riedel.)

A. Yes, sir.

Q. Is Mr. Smith a member of that Bureau?

A. I think so. I have seen him up there a lot of times.

Q. Now, do you have copies of tariffs published by the Columbia River Tariff Bureau in your office?

A. Yes, sir.

Q. And you are a participating carrier?

A. That is right.

Q. And are the various carriers who participate in these tariffs listed on the front page of that tariff?

A. I think they are.

Q. Is Mr. Smith's name there?

A. Well, I am not positive, but I think it is there, but I wouldn't say for sure. I don't know as I looked over that tariff—

Q. Those tariffs are in your possession, however?

A. Oh, yes. We wouldn't be able to bill if we didn't have them.

Q. Now, Mr. Riedel, when you report your gross revenue—or, excuse me,—Do you report your gross towing revenue and your barge revenue to the Interstate Commerce Commission?

A. Well, I tell you, our office manager and tax man that we have takes care of that and I wouldn't know exactly how to handle that, but we handle it in the right way, I am quite sure of that.

Q. Well, you make an annual report to the Interstate Commerce Commission, do you not, Mr. Riedel?

(Testimony of Arthur A. Riedel.)

A. That is right.

Q. And don't you recall that you give your gross towing for the year in that report?

A. No, sir; I am so busy, going about twenty-four hours a day, and I leave that to the other fellow.

Q. You are General Manager of the company?

A. That is right.

Q. Well, assuming that your gross revenue was reported to the I.C.C., Mr. Riedel, would you put the towing revenue from this boat, the Charles T., which your company billed, and include that in the gross revenue of the Willamette Tug and Barge Company?

A. Well, I tell you, I am not an attorney or I am not a tax expert and I don't go in for that sort of thing, and you would have to come down and talk to our men at the office to get that, but I know that we do it the right way.

Q. Now, when you made the remark on direct examination that the captain "beat it up to Stevenson" did you mean that he took the boat up there?

A. Well, he went up to get groceries, and I am at the office about a fourth of the time and I am not sure whether he took the boat, but I know he went several times in the car.

Q. Yes. Now, you mentioned——

A. He also said in the office that he was captain of the boat and fully responsible and he was working for Mr. Smith, right in front of everybody there.

Mr. White: Well, I move that the remarks of

(Testimony of Arthur A. Riedel.)

the witness be stricken as not responsive to the question.

The Court: Yes, those remarks are stricken, because the authority of an agent can't be proved by hearsay on his own declaration.

Mr. White: Q. Now, Mr. Riedel, you [243] mentioned on direct examination that you employed Kensley, Shaver, and I believe there was one other man,—

A. St. Helens, Johnny Redding, Johnny White.

Q. Now, where are the headquarters of those firms?

A. Well, Johnny White is right straight across from us—

Q. Well, they are all in Portland harbor?

A. That is right.

Q. Do you know where the headquarters of C. T. Smith and Son are?

A. Stevenson, I understood.

Q. How far is Stevenson from the Portland harbor?

A. Oh, I wouldn't know. About forty-five or fifty miles. I don't know exactly.

Q. And any towing, generally speaking, is it up the river, above Vancouver?

A. No, sir.

Q. It is all below Vancouver or Portland?

A. Not all.

Q. Not all; but the great part of it?

A. Yes.

(Testimony of Arthur A. Riedel.)

The Court: I am sorry, I will have to suspend at this time. You may take the rest of the record. You don't need to stop.

Mr. White: Well, for the convenience of the Court, I will suspend right now, with one or two more questions.

Mr. Recken: That is our last witness. We have no more witnesses. [244]

Mr. White: Is that agreeable, your Honor, to ask him one or two more questions?

The Court: Yes.

Mr. White: Q. Did you ever put a man on the Charles T., to your knowledge?

A. Yes, sir, there was one Sunday that a fellow by the name of George McDonald that worked for Smith, and our boat had broke down, and he said, "Art, I would sure like to make that tow. I can't get anybody." I said, "I haven't anything to do with the boat, but," I said, "being that you work for Smith, you can call him at The Dalles, and it is okeh with me," and he called Mr. Smith at Stevenson and Mr. Smith gave him permission to make that tow and he got paid for the tow just the same as though our man wasn't on it, and it was between him and the Captain who had run that boat before.

Mr. White: That is all I have.

(Witness excused.)

Mr. White: Your Honor, I have just one question I would like to ask Mr. Smith in rebuttal and that will conclude our case.

The Court: Well, you can ask him after I go. I

am going to stop right now. That is all right, just put in in the record and I will have it under consideration, because this is the only part of the case that I need any consideration on. So far as the accident is concerned, why, I am perfectly able to hold right now. I hold that Libelants are entitled to recover and that the responsibility is divided, [245] because it is perfectly obvious in this situation that there was a violation of the rules of navigation on the part of both, flagrant and serious violations. As a matter of fact, it isn't remarkable that these boats came together. It would be a remarkable thing if they had kept apart, under all the circumstances, the way navigation was carried on on the river at that time. If there was any way to penalize that sort of navigation the Court would go further, but I think the only equitable way to do is to divide the damages.

Mr. Recken: And there was one other question, if the Court please, as to the amount. Or is the Court going to take that under consideration?

The Court: Yes, the amount of damages I will take under consideration, likewise the question about the responsibility between Willamette and Smith.

Mr. Recken: Would the Court want us to make a written proof on it, your Honor?

The Court: Well, I will be back next week. I will hear you orally, if you would rather do it that way.

Mr. Recken: Well, I think probably that would be acceptable. What day next week?

The Court: I have no idea right now. I don't want to set my calendar for next week,——

Mr. Recken: Well, unfortunately, I have two cases in the Circuit Court next week. [246]

The Court: I won't deal with that question right now. If you will take it up with me next week I will give you time.

Mr. Recken: Yes.

The Court: Court is now in adjournment until tomorrow morning at ten o'clock.

Mr. White: Your Honor, may I——

The Court: Anything else that you take is within the record.

(Thereupon, at 11:05 o'clock A.M., June 22, 1945, the Court left the bench, and an adjournment of Court was had until 10:00 o'clock A.M., June 23, 1945, and thereafter on this 22d day of June, 1945, in the absence of the Court, further proceedings in the trial of the above-entitled cause were had as follows:)

ARTHUR A. RIEDEL

was thereupon recalled as a witness in behalf of Willamette Tug and Barge Company, Respondent, and, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination

By Mr. Recken:

Q. Have you ever leased any other ship before?

A. Yes, I have leased two boats before, and when I made the lease I made out a long lease agreement

(Testimony of Arthur A. Riedel.)

and had the boat inspected and had full insurance in every manner, way, shape and form, and any time I would enter into any kind of a lease or anything that would be the first thing that I would do.

Mr. Recken: All right, that is all, Mr. Riedel.

Recross-Examination

Mr. White: I would like to ask him some questions.

Q. Mr. Riedel, you have leased or chartered more than two boats, have you not?

A. I only remember of leasing two.

Q. Well, you have told us about a number of other instances.

A. I told you about boats that just does towing for me, but I have only leased two boats in my whole entire time.

Q. That is, where you have had formal contract?

A. No, just leased the boats.

Q. Well, I know, but aren't you making a legal conclusion when you say what leasing a boat is?

A. When I lease a boat I lease the boat and take all the responsibility. When I give my towing out to somebody else, why, they are on their own.

Q. That is, as far as you are concerned they are on their own?

A. As far as the Willamette Tug and Barge Company.

Mr. White: That is all.

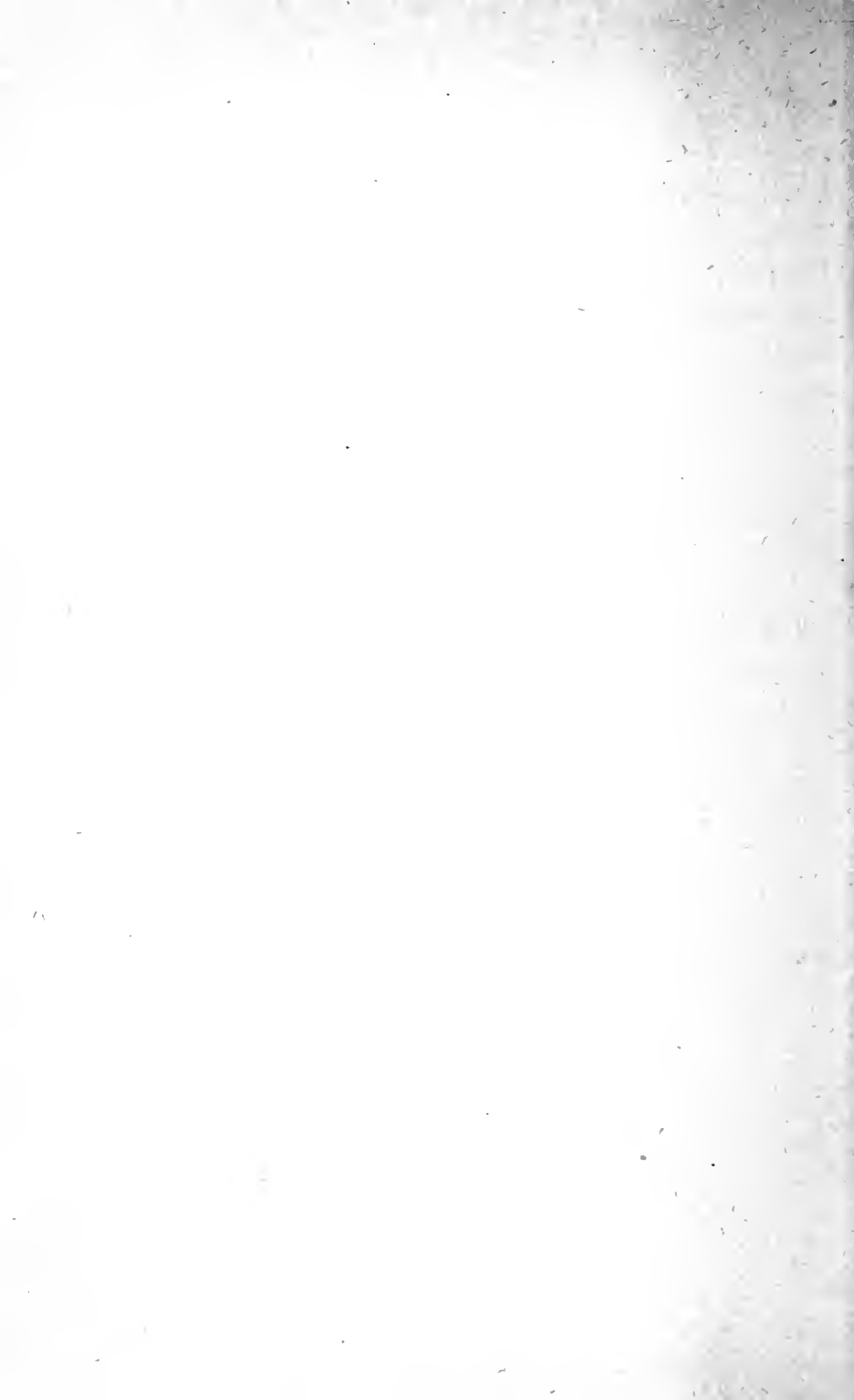
(Witness excused.)

[Endorsed]: Filed July 15, 1946. [248]

[Endorsed]: No. 11390. United States Circuit Court of Appeals for the Ninth Circuit. Willamette Tug and Barge Company, a corporation, Appellant, vs. Ole Ericksen and Pacific Building Materials Company, a corporation, C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son, Claimants of the Tug "Charles T", Steamship "Karl Liebknecht", Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed July 19, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.



In the United States
Circuit Court of Appeals
For the Ninth Circuit

WILLAMETTE TUG AND BARGE COMPANY,
a Corporation,

Appellant,

vs.

OLE ERICKSEN and PACIFIC BUILDING
MATERIALS COMPANY, a Corporation, C. T.
SMITH and ESSON SMITH, co-partners do-
ing business as C. T. Smith and Son, Claimants
of the Tug "CHARLES T", Steamship "KARL
LIEBKNECHT",

Appellees.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the District Court of the United
States for the District of Oregon.

SENN & RECKEN,
L. A. RECKEN,

Proctors for Appellant,

910 Public Service Building,
Portland, Oregon.

FILED

OCT 17 1946

INDEX

	Page
Appendix	37
Assignments of Error—Appendix	37
Argument	7
Authorities	13
Conclusion	36
Corrections in Apostles—Appendix	38
Jurisdiction	1
Specification of Errors Relied On	7
Statement	2

TABLE OF CASES

	Page
Adams v. Carey, 60 Or. 153, 118 P. 553	21
48 American Jurisprudence, 202	13
48 American Jurisprudence, 203	8, 14
48 American Jurisprudence, 205	14
Barbaro v. Auditore Contracting Co. Inc., et al, 214 N.Y.S. 221	28
Beaver, The, 219 F. 139	26
Captaine Faure, The, 10 F. (2d) 950	25
Charlotte, The, 285 F. 84	28, 31
City of Everett, The, 107 F. 964	31
58 C.J. 156	27
Daniff v. Charles R. McCormack and Co., 105 Or. 697, 210 P. 703	23
Davison Chemical Corporation v. The Henry W. Card et al, 144 F. (2d) 705	26
DeBardelegen Coal Corporation v. U. S., 54 F. Supp. 643	35

TABLE OF CASES (Cont.)

Page

Gormley v. Thompson-Lockhart Company, 234 F. 478	27
Grimberg v. Columbia Packers Association, 47 Or. 257, 83 P. 194	15, 20, 21
Hahlo et al v. Benedict, 216 F. 303	30
India, The, 16 F. 262	31
Leader, The, 166 F. 139	28
Leary v. United States, 81 U.S. 607	26
Luchenbach v. Insulor Line, 186 F. 327	28
Luchenbach v. McCahan Sugar Co., 248 U.S. 139	28
Marcadier v. Chesapeake Insurance Co., 12 U.S. 39	28
Miami Quarry Company v. Seaborg Packing Company, 103 Or. 362, 204 P. 492	24
Middlebrook, Frederick J., 67 Ct. of Claims 294	29
Multnomah County v. Willamette Towing Company, 49 Or. 204, 89 P. 389	20
New Orleans-Belize Steamship Company v. United States, 239 U.S. 202	25
Nicaragua, The, 72 F. 207	28
Norland, The, 101 F. 967	28
Pacific Improvement Company v. Schubach-Hamilton Steamship Company, 214 F. 854	26, 28
Reed v. United States, 78 U.S. 591	26
Steel Inventor, The, 35 F. Supp. 986	28
Sturgis v. Boyer et al, 65 U.S. 110	28
Terne, The, 64 F. (2d) 502	25
49 U.S.C.A., Sec. 903 (f)	34
Volund, The, 181 F. 643	28
Watts v. Camorse, 10 F. 145	27
West Eldara, The, 101 F. (2d) 45, 104 F. (2d) 670	24

In the United States
Circuit Court of Appeals
For the Ninth Circuit

WILLAMETTE TUG AND BARGE COMPANY,
a Corporation,

Appellant,

vs.

OLE ERICKSEN and PACIFIC BUILDING
MATERIALS COMPANY, a Corporation, C. T.
SMITH and ESSON SMITH, co-partners do-
ing business as C. T. Smith and Son, Claimants
of the Tug "CHARLES T", Steamship "KARL
LIEBKNECHT",

Appellees.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the District Court of the United
States for the District of Oregon.

JURISDICTION

This was a libel in admiralty in the District Court of the United States for the District of Oregon. The appeal is from the decree there entered against the appellant; consequently the jurisdiction of this Court is clear.

STATEMENT

The Willamette Tug and Barge Company, the appellant in this cause, is a corporation and engaged, among other things, in the business of towing barges and ships on the Willamette and Columbia Rivers. Willamette Tug and Barge Company, appellant, owned five tugs, and in addition, according to the testimony of Arthur A. Riedel (R. 97) gave out a lot of towing to other boats. C. T. Smith & Son were the owners of a small diesel tug named the "CHARLES T". They had their place of business in Stevenson, Washington, located on the Columbia River some fifty (50) miles by water from Portland, Oregon. Prior to the month of April, 1944, Arthur A. Riedel as president and manager of the Willamette Tug & Barge Company and Esson Smith had a telephone conversation relative to the matter of using the Tug "CHARLES T". Esson H. Smith contends that his telephone conversation was in regard to a charter of the boat. (R. 86). Arthur A. Riedel of the Willamette Tug & Barge Company testified that Smith communicated with him regarding the matter of towage. (R. 97). Thereafter, as a result of a telephone conversation and a personal visit, the Tug "CHARLES T" was moved from Stevenson, Washington, to Portland, Oregon; and for the months of April, May and part of the month of June, 1944, the Tug "CHARLES T" was engaged in towing on the Willamette and Columbia Rivers.

On June 22, 1944, the Tug "CHARLES T" was engaged in towing three empty barges from Portland to Longview, Washington. One of the barges was the

EK-9. At a point in the Columbia River a collision occurred between the Russian steamship KARL LIEBKNECHT and the Barge EK-9, which was being towed by the Tug "CHARLES T". Later, on June 9, 1944, a libel was filed in the United States District Court for the District of Oregon against the diesel tug "CHARLES T", the libel being in rem, and filed by Ole Erickson and others. Later on C. T. Smith and Esson Smith as owners of the tug "CHARLES T" filed a petition to bring in the Willamette Tug & Barge Company, an Oregon corporation, under Rule 56 Admiralty Laws of Practice, and an order was made impleading the Willamette Tug & Barge Company. In the petition of C. T. Smith and Esson Smith it was alleged that C. T. Smith and Esson Smith entered into an oral contract with the Willamette Tug & Barge Company whereby for and in consideration of an agreed rental to be paid by the Willamette Tug & Barge Company that the said C. T. Smith and Son did charter, transfer and deliver to the Willamette Tug & Barge Company the entire custody, possession, management and control of the tug "CHARLES T", including the entire command and control over the navigation of the tug; and C. T. Smith and Esson Smith further alleged that at the time of the collision between the KARL LIEBKNECHT and the Barge EK-9 that the tug was being operated under the provisions of the alleged oral charter.

Later on the Willamette Tug & Barge Company filed its answer denying the alleged charter. Thereafter the District Court of the United States for the District of Oregon made its pre-trial order, same being filed on

June 20, 1945. (R. 36-49, inclusive). In the pre-trial order the contentions are set forth in detail, as well as the admitted facts (R. 36-49).

On December 29, 1945, (R. 50) the Honorable James Alger Fee, District Judge, rendered his opinion, and on March 11, 1946, a final decree was entered (R. 57) wherein the District Court of the United States for the District of Oregon decreed that the libelants have judgment against the Willamette Tug & Barge Company, an Oregon corporation; and furthermore, that C. T. Smith & Son have judgment against the Willamette Tug & Barge Company for the entire amount of the libelant's judgment, which C. T. Smith & Son might be required to pay.

This appeal is directed only to that portion of the final decree which holds the Willamette Tug & Barge Company to have been the charterers pro hac vice of the tug "CHARLES T" at the time of the collision, and also from that portion of the decree which renders judgment against the Willamette Tug & Barge Company for the full amount of the damage as found by the court, and in the alternative by the United States District Court for the District of Oregon failing to grant to the Willamette Tug & Barge Company a decree of dismissal and a judgment as against C. T. Smith and Esson H. Smith for costs and disbursements.

The appellant does not in this appeal desire any review of the findings of the United States District Court for the District of Oregon fixing the blame for the collision on both the tug "CHARLES T" and the steamship

KARL LIEBKNECHT; nor does this appellant in this appeal take any exception to the amount of damages awarded; and the issues in this appeal are therefore narrowed to the one proposition, to-wit:

WAS THE ORAL ARRANGEMENT BETWEEN C. T. SMITH & SON AND THE WILLAMETTE TUG & BARGE COMPANY A CHARTER PRO HAC VICE, OR WAS IT MERELY AN AGREEMENT OF TOWING OR AFFREIGHTMENT?

The testimony on the matter of the arrangement between C. T. Smith & Son and the Willamette Tug & Barge Company is very short and consists of the testimony of Charles Richard Bates, master of the tug, (R. 75), Lloyd Chappell, deckhand of the tug, (R. 82), Es-son H. Smith, part owner of the tug "CHARLES T" (R. 84) and testimony of Arthur A. Riedel of the Willamette Tug & Barge Company. (R. 97-110).

A brief summary of the record as we view it would indicate that there never was any written agreement. C. T. Smith & Son claimed that they entered into a charter and that, therefore, the burden of proving the charter is upon C. T. Smith & Son. The testimony in this case indicates the following facts. C. T. Smith & Son paid the salary of the captain of the tug "CHARLES T", also the salary of the deckhand. C. T. Smith & Son paid all of the operating expenses, groceries and wages of the crew. There is not one scintilla of evidence that the Willamette Tug & Barge Company knew the salaries of the captain or the deckhand. The only thing that is definite and upon which there is no

dispute is that C. T. Smith & Son were to receive eighty per cent (80%) of all charges made for towing, and the Willamette Tug & Barge Company was to receive twenty per cent (20%). At the end of each month payment was to be made for whatever towing was done, and C. T. Smith & Son would bill the Willamette Tug & Barge Company. Pre-trial exhibit No. 14 (R. 93) indicates that the tug on some days apparently did very little work, and that apparently payments were made on each job of towing. Pre-trial exhibit No. 12, being a check of the Willamette Tug & Barge Company to C. T. Smith specifically notes that the check is in payment of "towing for the month of April, 1944, by towboat Charles T." There is no testimony that C. T. Smith & Son were to receive any stated amount per day, the only testimony being that they were to receive eighty per cent (80%) of whatever was charged for towing. There is absolutely no testimony in the record as to how long the arrangement was to exist. There is no testimony of any guaranteed return. The only testimony in which the parties agree is that C. T. Smith & Son paid all the operating expenses and costs, and it is the contention of the appellants that C. T. Smith & Son having alleged that a charter pro hac vice existed, that the burden was on C. T. Smith & Son to prove a charter, and having failed to do so, the judgment should be entered in favor of appellant.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON BY APPELLANT

Appellant relies on Assignments of Errors Nos. 1, 2, 3, 5 and 6, and which assignments of errors relied upon are printed as an appendix to this brief. These assignments can probably be treated as one assignment of error for the reason that they are so closely related that a decision on Assignment of Error No. 3 will be reference decide the other assignments of errors. In other words, the crux of this appeal is whether or not the United States District Court for the District of Oregon erred in holding and decreeing that under all of the testimony and the exhibits that there was a charter by C. T. Smith & Son to the Willamette Tug & Barge Company, and that C. T. Smith & Son did transfer and deliver to the Willamette Tug & Barge Company the entire custody, management and control of the tug "CHARLES T", including the entire command and control of its navigation, and that the master and deck-hand of the tug "CHARLES T" were at the time of the collision agents and servants of the Willamette Tug & Barge Company.

ARGUMENT

The principles of a charter and the elements necessary to constitute a charter are well known. A charter and a contract of affreightment or a naked contract or agreement of towing are two entirely different things. A charter contemplates a transfer of the entire command

and possession and consequent control over its navigation and amounts to a demise of the vessel, and the charterer will generally be considered as the owner for the voyage or service stipulated. The courts will not ordinarily regard a contract as a demise if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer. It follows accordingly that the presumption primarily is against the demise and the contract is to be construed as one for an affreightment *unless the terms show a clear intendment to the contrary*. (Italics supplied. 48 Am. Jur. 203).

A few citations from the testimony of the witnesses indicate as follows:

Mr. Riedel, who was the President and General Manager of the Willamette Tug & Barge Company, testified concerning the agreement between C. T. Smith & Son and the Willamette Tug & Barge Company as follows:

"Q. And when did you first meet Mr. Smith, the owner——

A. Well, I don't remember just exactly, but I had seen him at some meetings here about a year or so ago.

Q. Well, how did it come about that he did this work for you?

A. Well, here is the way I remember it, that he called me up and heard that I had more towing that I could do, and so I told him yes, and he said he would like to take some of it on, and so he wrote me a letter telling me that he would do it for 90 per cent., and I told him we had to wait so long for our money and so much trouble in the billing that I wouldn't go for ninety but for 80 per cent., give him twenty and me eighty (sic), and he take

the tows, just like anybody else, when there are any to take. He asked me if I thought that he could make six or seven hundred dollars. (235) I told him that we had a lot of towing and that if he tied up where it was handy—of course, I always get a boat—they want them at the ships, they call and want them right now, and if he was handy, why, he could do pretty well.

Q. How did it happen that he tied up at the—

A. Well, there was a few times that he tied up some place else, but I told him if he tied up there where it was handy he could get more tows, because when a tow comes in we give it to the one that is ready right now, or the next one that is handy. For instance, St. Helens, or Kensley (?), Johnny Redding, and fellows like that, they do the same thing, and when they have a tow and we have to do the billing they kick back with 10 per cent. or 20 per cent.

Q. Mr. Riedel, was there at any time anything said about charter between you and Smith relative to this?

A. No, in our conversation Smith never said a word about charter at all. I asked him about insurance and things which I ask everyone that does towing for me, and he said okeh, and I said that was good enough for me." (R. 97 & 98).

Further, concerning the matter of towing, Mr. Riedel testified as follows:

"Q. Now, did you give orders to Captain Bates?

A. Well, here is the only thing, an order would come in, if our boats wasn't there and his happened to be there, why, I would take and tell the Captain he had a barge to go so and so and it was up to him if he wanted to take it; if he didn't want to take it we would get the next handiest man, because we had to be there as soon as possible.

Q. Did your organization do any work on the Tug Charles T.?

A. No, sir, none whatever.

Q. Did you pay the employees?

A. No, sir. The only time—there was a time or two when the boys would beat it up to Stevenson to get their groceries, and there was times when they were a little short of money and they made a person-to-person loan from the bookkeeper; the bookkeeper give them a receipt and give it to them out of petty cash; and then there was times, when they would get a check, they would come in and pay it. They always paid their bills.

Q. Did you ever furnish any oil or lube?

A. No, sir, we had nothing to do with that. I didn't even know what dock they got their oil at, never noticed or paid any attention.

Q. Now, the statement of Mr. Smith to the effect that you wanted the boat kept at your moorage?

A. I didn't care if it was kept there. If it was kept there they made it a little handier for me, and I have got nine hundred foot of space there and one more boat wouldn't have made any difference.

Q. In your conversation with Mr. Smith when this towage arrangement was made was there anything said by you to Mr. Smith as to whether he could do other towing for other people?

A. No, sir, it didn't make a bit of difference to us. If he wasn't there we called Johnny Redding, Johnny White, Kensley, St. Helens, Shaver sometimes, even had Smith at Rainier,—just called on the one that was handiest to get the job done as soon as possible.

Q. Well, the question I asked you, did you have any conversation with Mr. Esson Smith to the effect that even though he was tied at your dock he could take other tows?

A. I told him if there was any tows came up it was jake with me, all I wanted to do was to get my work done, if he wasn't there I would get somebody else, because everyone on the river there works for us that is handy.

Q. And how many different ones tow for you?

A. Well, there's about six or seven or eight, and 'most all but and kicks back at 10 or 20 per cent., because we have to do the billing and sometimes we have to wait three or four months for our money and sometimes have to borrow money to pay our bills." (R. 99 & 100).

It will be noticed from the foregoing, in answer to a question to Mr. Riedel whether Esson Smith could take other tows, that Mr. Riedel testified:

"A. I told him if there was any tows came up it was jake with me, all I wanted to do was to get my work done, if he wasn't there I would get somebody else, because everyone on the river there works for us that is handy." (R. 100).

It further appears from the foregoing testimony that no orders were given to Captain Bates; that if an order came in for a tow and none of the tugs of the Willamette Tug & Barge Company were available, that he (Riedel) would speak to Captain Bates and ask him if he wanted to make the tow.

Furthermore, Mr. Riedel on cross-examination testified as follows:

"Mr. White: Q. Did you ever put a man on the Charles T., to your knowledge?

A. Yes, sir, there was one Sunday that a fellow by the name of George McDonald that worked for Smith, and our boat had broke down, and he said, 'Art, I would sure like to make that tow. I can't get anybody.' I said, 'I haven't anything to do with the boat, but,' I said, 'being that you work for Smith, you can call him at The Dalles, and it is okeh with me,' and he called Mr. Smith at Stevenson and Mr Smith gave him permission to make

that tow and he got paid for the tow just the same as though our man wasn't on it, and it was between him and the Captain who had run that boat before." (R. 107).

It will be noticed from the foregoing that George McDonald, the man that worked for Smith, wanted to make a tow and made inquiry of Mr. Riedel for permission to use the tug "CHARLES T", and that Mr. Riedel told him to call Mr. Smith at The Dalles, and that Mr. Smith gave permission to make the tow; and Mr. McDonald was paid for making the tow. It would hardly appear from this testimony, which was not contradicted by Mr. Smith, that the whole control of the tug "CHARLES T" was turned over to the Willamette Tug & Barge Company by Smith & Son. Smith & Son even at that time exercised ownership and control of the use of the tug.

It further appears that Esson Smith testified that the agreement between himself and the Willamette Tug & Barge Company was an oral one and that it was agreed:

1. That Smith would pay all operating expenses.
2. That Smith would furnish all diesel and lube oil.
3. That Smith would furnish all groceries.
4. That Smith would pay all wages. (R. 86).

At no time in the negotiations prior to April, 1944, was anything said about repairs, upkeep, or damage that might have been caused by accident. The only testimony regarding this matter is that Mr. Riedel testified (R. 98) that Smith was asked concerning his insurance. The testimony also discloses (R. 89) that a check

written out by Willamette Tug & Barge Company to C. T. Smith & Son is in payment, "for towing". This check was cashed by Smith & Son without any protest.

Summarizing this matter, the testimony discloses in our opinion nothing more than a mere and naked contract of affreightment. It is a well settled rule of law that where a vessel is chartered, that there is an entire surrender of the vessel to the charterer, and if the object sought can be conveniently accomplished without a transfer of the vessel, the courts will not be inclined to consider the contract as a demise of the vessel.

AUTHORITIES

There is an excellent statement of the general principles concerning charter parties and contracts of affreightment in Volume 48 of American Jurisprudence commencing on page 202. It is explained that charters are of two kinds and that they differ from each other very widely in their nature as well as in their terms and legal effect. "A charter by whose terms the whole vessel is let to the charterer with a transfer to him of its entire command and possession and consequent control over its navigation amounts to a demise of the vessel, and the charterer will generally be considered as owner for the voyage or service stipulated. . . . But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed

with the character or legal responsibility of ownership. . . . In brief, there is a demise where the charterer is given the possession and control of the vessel, but not where he acquires merely the right to her services."

The courts will not ordinarily regard a contract as a demise if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer. "It follows accordingly that the presumption primarily is against the demise, and the contract is to be construed as one for an affreightment, *unless the terms show a clear intendment to the contrary.*" (Italics supplied.) 48 Am. Jur. 203.

It is pointed out that the terms of greatest significance in the determination as to whether a given charter amounts to a demise or is merely a contract of affreightment are those which relate to the master and crew. "If they are appointed and paid by the owner, and are subject to his orders, the charter will ordinarily be construed as an affreightment contract, on the theory that through his master and crew the owner retains possession and control of the ship, even though the directions on which the ship shall proceed are given by the charterer." 48 Am. Jur. 205.

It is to be further noted that charter parties are governed by many of the principles applicable to the formation of ordinary contracts and that mutual agreement or assent to all the terms of an alleged contract is a primary requisite. 48 Am. Jur. 205.

The Oregon cases dealing with this question have been carefully analyzed and support the Appellant's

contention that the agreement in this case was merely a contract of affreightment. In *Grimberg v. Columbia Packers Association*, 47 Or. 257, 83 P. 194, an administratrix brought an action against the association to recover for the death of her husband. The association had chartered the vessel, upon which the deceased was working as a sailor at the time of his death, from a firm in San Francisco for a voyage to Alaska and return from Astoria, Oregon. The captain of the vessel and certain members of the crew were paid by the San Francisco owners, but the husband of the administratrix had been hired by the charterer. The administratrix contended that the defendant association was owner pro hac vice of the vessel and therefore liable for the death of the deceased husband. The defendant on the other hand contended that the San Francisco owners were solely liable. The trial court granted a non-suit upon motion of the defendant and this was affirmed on appeal. The issue was squarely presented and fully discussed as to whether the charter constituted a demise or a mere contract of affreightment. It has been deemed advisable to quote at considerable length from the well considered opinion of the Honorable Chief Justice Wolverton as follows:

“The question presented arises almost wholly upon a construction of the charter party for there are but few extraneous facts that shed any light upon the subject, which is whether the agreement constituted a demise of the vessel to the defendant or was merely a contract of affreightment, the general owners retaining the control, management and navigation thereof. It is well to observe at the outset that the presumption primarily is against a

demise, and the contract is to be construed as one for an affreightment, unless the terms show a clear intendment to the contrary: Say the learned authors of the American and English Encyclopaedia of Law (2 ed.), vol. 7, p. 167: 'The presumption is that the ownership of the vessel, even during the period covered by the charter party, continues in the general owner; and, unless the intention to transfer the possession and ownership to the charterer is unequivocally manifested by the contract, a charter party will not be treated as a lease or demise of the ship, but will be treated as a contract of affreightment.' So, in *Reed v. United States*, 78 U.S. (11 Wall.) 591, 601 (20 L. Ed. 220), Mr. Justice Clifford says: 'Courts of justice are not inclined to regard the contract as a demise of the ship, if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer. but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and, if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts.' The burden, therefore, lies with the plaintiff to overcome this presumption. . . .

"We should keep in mind, however, the presumption applicable, so that the doubt, if one exists, may be resolved in favor of a contract of affreightment, rather than a demise of the vessel. See further, *Adams v. Homeyer*, 45 Mo. 545 (100 Am. Dec. 391); and *Certain Logs of Mahogany*, 2 Sumn. 589 (Fed. Cas. No. 2559).

"The general rule of construction relating to the charter party is that if the vessel, the subject of the agreement, be let so that there is a transfer or relinquishment to the charterer of the entire command, possession and subsequent control, he will be treated as owner for the time being, that is, for the voyage or particular service stipulated for. How-

ever, if the charter party is but an agreement or covenant for the use of the vessel or some designated part thereof, the general owner at the same time retaining command, possession and control over its navigation, the charterer must be regarded as a contractor only for a designated or specific service, which does not alter the duties and responsibilities of the owner. In the one case the charter party operates as a lease or demise of the vessel, whereby the lessee assumes the duties and liabilities in a large measure, at least, of the owner; while in the other the agreement is for a special service to be rendered by the owner of the vessel: *Reed v. United States*, 78 U.S. (11 Wall.) 591, 601 (20 L. Ed. 220). 'All the cases agree,' says Mr. Justice Field, in *Leary v. United States*, 81 U.S. (14 Wall.) 607, 611 (20 L. Ed. 756), 'that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned.' 'But,' says Mr. Justice Story, in *Marcadier v. Chesapeake Ins. Co.*, 12 U.S. (8 Cranch) 38, 48 (3 L. Ed. 481), 'where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership.' See, also, *United States v. Shea*, 152 U.S. 179 (14 Sup. Ct. 519, 38 L. Ed. 403); and *Emery v. Hersey*, 4 Greenleaf, 404 (16 Am. Dec. 268). So that the distinguishing feature between a demise of the ship, whereby the legal responsibilities of ownership are transferred to and assumed by the charterer, and an agreement for affreightment, is clear, and the main difficulty lies in determining what the parties intended by the charter party, considering the language in which it is clothed. . . .

"The word 'chartering' does not necessarily mean a letting of the ship by way of demise, and is equal-

ly as consistent with the idea of a contract for affreightment: *Ross v. Charleston M. & S. Transp. Co.*, 42 S. C. 447 (20 S. E. 285).

"Following this are engagements of the first party in two clauses—the first to the effect 'that the said vessel, in and during the voyage, shall be kept tight, staunch, well fitted, tackled,' etc.; and the second that 'the whole of such vessel, excepting the private apartments of the master in the cabin,' etc., 'shall be at the sole use and disposal of the' second party during the voyage, and that no goods 'shall be laden on board otherwise than for said' second party. These contain cogent and forcible expressions indicating that an affreightment only was intended, and not a demise. They imply, first, that the owners shall have an oversight of the ship to see that it be kept in proper condition during the voyage, and, second, that they should engage in freighting the vessel, consistent with the previous clause, agreeing that no goods should be laden thereon except such as the charterer should designate. The engagements are simply what they purport to be, covenants on the parts of the owners, and are inconsistent and incompatible with the idea of a demise: *Leary v. United States*, 81 U.S. (14 Wall.) 607 (20 L. Ed. 756). . . .

"By succeeding clauses it was agreed that the charterer should pay all wages of the crew, excepting the captain, all port charges and labor bills, and furnish all necessary provisions, fuel, etc., during the whole of the voyage, and should at the termination of the charter deliver the vessel in port of destination to the owner in as good condition as when chartered, reasonable deterioration for usage excepted, and that it should 'employ' the vessel only in lawful trade. These clauses certainly militate strongly against the idea of a contract of affreightment, for the charterer has taken upon himself the entire expense of the voyage, except the wages of the captain, which are provided for in the consid-

eration for the charter of the vessel. In other words, the captain's wages were included in the monthly payments to be made for the charter. Who were to furnish the crew we are not advised. By all reasonable intendment the owners were to furnish the captain or master, for why should they provide for the payment of his wages along with the consideration for the charter of the vessel? If the charterer was to provide such master, it would be a matter of indifference with the owners respecting the payment of such wages, except that they would probably have required a stipulation on the part of the charterer, as they have with reference to the wages of the crew, that such wages should be discharged, so that they would not become a lien upon the ship. From evidence aliunde we know that the decedent and others were employed by defendant to ship as sailors for the voyage. But there were mates aboard who undoubtedly participated in the navigation of the ship, and we are unadvised as to who furnished or employed them, the owners or the charterer. Their wages were to be paid by the charterer. The provisions touching the expense of the voyage are certainly largely inimical to the idea of a contract of an affreightment only: *Drinkwater v. Freight and Cargo of the Brig Spartan*, 1 Ware. 149, (Fed. Cas. No. 4085); *First Nat. Bank of Marquette v. Stewart*, 26 Mich. 84. . . .

"The natural deduction would be that the owners retained command and possession and the consequent navigation of the vessel through the master and mates. . . .

"These considerations, taken in connection with the legal presumption that obtains in favor of the continuance of ownership of the ship in the general owners, and against any transfer thereof for the voyage, impel us to the conclusion that the contract is one of affreightment only, and does not constitute a demise. The presumption alluded to is said to be so strong that, if the end sought to be affected by

the charter party can conveniently be accomplished without a transfer of the vessel to the charterers, the law is not disposed to regard the contract as a demise; and this, even if there be express words of grant in the formal parts of the instrument: *Hagar v. Clark*, 78 N.Y. 45. No such words whatever are found in the present charter party." (The foregoing excerpts are from 47 Or. 257; 83 P. 194.)

In *Multnomah County v. Willamette Towing Company*, 49 Or. 204, 89 P. 389, the County brought an action to recover for damages caused by the steamship, *Almond Branch*, fouling the Morrison Street Bridge in Portland, Oregon. The vessel was owned by an English concern and was under charter to the Pacific Export Lumber Company. The vessel had taken a part of a cargo of lumber, and the captain was directed by the charterer to proceed to the lumber company's dock to receive the remainder of its cargo. The lumber company obtained a tug to assist in the steering of the vessel while proceeding to its dock, and the vessel fouled the bridge while the tug was so engaged. The lumber company interposed the defense that it did not control the vessel and was a mere charterer. A judgment was entered by the defendant lumber company which was affirmed on appeal. The court, on page 215, stated as follows:

"There was no evidence, so far as we can ascertain, connecting the lumber company with any of the negligent acts charged. It was the charterer or hirer of the *Almond Branch*, but did not have command, possession or control of the vessel, so far as its management or navigation were concerned, except to direct where it should receive its cargo. The vessel was under the sole charge and command of

the master employed by and who represented the owners, and not the charterers. By the terms of the charter party, the owners agreed to let, and the lumber company to hire, the vessel 'with a full complement of officers, seamen, engineers and firemen, and in every way fitted for the service to trade' between such ports as the charterer might direct for a period of from three to nine calendar months at the charterer's option; the cargo to be taken or discharged at any dock or wharf the charterer might direct where the vessel could lie safely afloat. The owners agreed to provide and pay for all provisions, the wages of the captain, officers and crew, insurance, engine room stores, and to maintain the vessel in a thoroughly effective state in hull and machinery for service, and that the captain employed by the owner should be under the orders and direction of the charterers as regarded agency and other arrangements, and should prosecute his voyages with the utmost dispatch. The charterer was to provide and pay for fuel, port charges, expenses of loading, and the like, and 10 shillings per gross ton register per calendar month. Such a charter party is a mere contract of affreightment, and not a demise of the vessel, and the charterer is not liable for the acts and conduct of the officers and crew in the management of the vessel: *Grimberg v. Columbia Packers' Assoc.*, 47 Or. 257 (83 Pac. 194; 114 Am. St. Rep. 927)."

In *Adams v. Carey*, 60 Or. 153, 118 P. 553, the plaintiffs, owners of a tug, had chartered it to the defendants for an agreed rate. During the period of the charter the tug was involved in a collision with another vessel, and the defendants settled with the owners of the other vessel for damages suffered by the latter. The defendants sought to set off the amount paid in damages against the amount due under the charter contending that the

charter was a mere contract of affreightment. The plaintiffs contended that the charter constituted a demise of the vessel and that the defendants were owners *pro hac vice*. The court stated as follows:

“There is nothing peculiar or technical in the construction of this kind of contracts. As in all other agreements, the intention of the parties is the point to be aimed at. This should be determined from the whole instrument. Primarily the presumption is against a demise, and that the ownership of the vessel during the period of the charter party continues in the general owner; and, unless the intention to transfer the possession and ownership to the charter is unequivocally manifested by the contract, the charter party will not be treated as a lease or demise of the ship, but will be treated as a contract of affreightment. *Grimberg v. Columbia Packers' Association*, 47 Or. 257 (83 Pac. 194; 114 Am. St. Rep. 927), 7 Am. Eng. Enc. of Law (2 ed.) 167. . . .

“It was stipulated in this clause that the vessel was to perform such duties in accordance with the terms of the agreement as might be required of her by the charterer. In effect, it was covenanted that the defendant should direct where the vessel was to go, and what she was to do; but it does not appear that the defendant was authorized to direct how the service should be performed, or how the tug should be managed, the details of navigation being left to the owner, who retained command and possession of the vessel through the captain and crew.

“Clause 6 provided that all expenses of fuel, supplies, wages of the crew, and other expenses were to be borne by the plaintiffs, who were to keep the vessel fully furnished and in good condition to perform the required duties. They were at perfect liberty to employ thoroughly skilled and competent navigators for the tug at a fair compensation; or,

if they saw fit to take such a chance, they might employ less skilled and competent officers and crew, for smaller wages, to navigate the tug. From the evidence in the case, it also appears that the tug Sampson was under the direct control and management of the captain, who from the terms of the agreement, as well as from the evidence in the case, we think was the agent of the owners, and responsible to them, and that the charter party in question did not effect a demise of the tug, but was a mere contract of affreightment. *Grimberg v. Columbia Packers' Association*, 47 Or. 257 (83 Pac. 194; 114 Am. St. Rep. 927); *Multnomah County v. Willamette Towing Company*, 49 Or. 204 (89 Pac. 389); *The Santana (C.C.)* 52 Fed. 516; *Marcadier v. Chesapeake Insurance Company*, 12 U.S. (8 Cranch) 39 (3 L. Ed. 481); *Adams v. Homeyer*, 45 Mo. 545 (100 Am. Dec. 391); *Ross v. Charleston M. & S. Trans. Co.*, 42 S.C. 447 (20 S.E. 285)."

In *Daniff v. Charles R. McCormack and Co.*, 105 Or. 697, 210 P. 703, the court stated:

"Ownership and possession of the vessel, with the liabilities incident thereto, are presumed to remain in the owner, unless a contrary intention is unequivocally manifested by the contract: *Adams v. Carey*, 60 Or. 153, 159 (118 Pac. 553).

"In order then to complete her proof, plaintiff was obliged to show that the charter party or contract, if one existed between defendant and the owner of the vessel, contained unequivocal terms which imposed upon defendant the rights and liabilities of an owner of the vessel for the voyage that was in progress at the time plaintiff was injured. Plaintiff made no attempt to supply this proof.

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"If, however, it may be said that plaintiff was not bound to furnish evidence of the terms of the charter-party or contract between the owner and

defendant, the case of plaintiff is still defective, for the reason that primarily the presumption attaches to all such contracts that the contract is one of affreightment, in which the general owners retain the control, management and navigation of the ship and the legal responsibility of ownership: *Grimberg v. Columbia Packers' Assn.*, 47 Or. 257, 262 (83 Pac. 194, 114 Am. St. Rep. 927, 8 Ann. Cas. 491); *Multnomah Co. v. Willamette Towing Co.*, 49 Or. 204, 215 (89 Pac. 389); *Adams v. Carey*, 60 Or. 153, 159 (118 Pac. 553). . . .

"Counsel for plaintiff says that the exercise by defendant of authority to direct where cargo was to be taken and discharged constituted evidence that defendant controlled and operated the vessel.

"A provision in a charter-party that the master of the vessel employed by the owner shall be under the directions of the charterer, who may direct where cargo shall be taken and discharged, does not make the charterer liable for the negligence of the officers and crew in the management of the vessel: *Multnomah Co. v. Willamette Towing Co.*, 49 Or. 204, 215 (89 Pac. 389)."

In *Miami Quarry Company v. Seaborg Packing Company*, 103 Or. 362, 204 P. 492, the court stated on page 374:

"The operator of a tug engaged in a towing contract is ordinarily held to be an independent contractor: *Woodard v. A. F. Coats Lumber Co.*, 97 Or. 302 (191 Pac. 668). . . ."

It is well settled that where a contract or charter does not amount to a demise the navigation of a vessel is the sole responsibility of the owner. *The West Eldara*, 101 F. (2d) 45, 104 F. (2d) 670.

In *The Capitaine Faure*, 10 F. (2d) 950, the owners under the charter provided the captain and the crew. The court stated at page 962:

"It is certain that the charter party was not a demise. The captain, officers, and crew were not appointed by the charterers but named by the owners, and through them the owners were in possession of the vessel and responsible for her navigation."

In *The Terne*, 64 F. (2d) 502, the court held that the contract did not amount to a demise and stated:

"The captain managed the ship for the owner and though he was the agent of the charterer for some purposes, he was not in respect to the navigation of the vessel."

Justice Holmes in the leading case of *New Orleans—Belize Steamship Company v. United States*, 239 U.S. 202, at page 205 stated:

"The main contest is upon the question whether by this contract the United States became owner pro hac vice as affecting the extent of the liability assumed. . . . The general owner furnished the crew and a master who at least regarded himself as representing its interests since he protested against commands that he received. . . . We deem it plain that the control and navigation of the vessel remained with the general owner although the directions in which it should proceed were determined by the United States. *Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person.* . . . We conclude that the possession followed the navigation and control." (Italics supplied).

The federal courts also hold that there is a presumption against a demise. In *Pacific Improvement Com-*

pany v. Schubach-Hamilton Steamship Company, 214 F. 854, the court stated at pages 859 and 860:

"The presumption is that the contract was one of affreightment, merely, and the contrary must clearly be made to appear before it will be held to constitute a demise. . . . That the contract was one of affreightment only is further shown by other provisions of the charter party. It provides that the owner shall pay the officers and crew. This, while not absolutely controlling, is persuasive."

Again in *Davison Chemical Corporation v. The Henry W. Card et al*, 144 F. (2d) 705 at 706, the court stated:

" . . . Under the charter provisions the owner paid the master and crew and retained control over the navigation of the tug. This was sufficient to prevent the contract from falling within those charters which have been interpreted as placing the master and crew and the navigation of the vessel under the control of the charterer. We think the charter plainly did not amount to a demise."

In *The Beaver*, 219 F. 139, the court held that there could be no demise if the owner retains control of the navigation and stated at page 142:

"The charterer in the present case, having nothing whatever to do with the navigation of the Selja, upon the most obvious principles of justice cannot be held in any way responsible for the negligence of her master, who in the matter of her navigation, was the agent of the owner and not the agent of the charterer."

To the same effect see *Leary v. United States*, 81 U.S. 607, where the court stated at page 611:

"All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the owner of such command, possession and control is incompatible with the existence at the same time of such special ownership in the charterer."

In *Reed v. United States*, 78 U.S. 591, 601, the court stated:

"Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer."

The case of *Gormley v. Thompson—Lockhart Company*, 234 F. 478, is quite analogous to the case at bar. The owner furnished the captain and crew of the vessel while the charterer gave orders as to its destination. The vessel negligently became involved in a collision which damaged its tow. The charterer had the tow repaired and sought to set off the amount so paid against the amount due under the charter. The court allowed the set-off and stated:

"The master and crew being employed by the libellant were his agents, and he is responsible for their acts within the scope of their employment."

In *Watts v. Camorse*, 10 F. 145, it is stated that federal courts may consider a charter party in the light of the law in the state where the contract was executed.

It is stated in 58 C.J. 156, that there is a presumption against ownership *pro hac vice*. At page 162 it is

stated that "a provision for compensation based upon a proportionate share of the net earnings is consistent with a contract of affreightment merely."

The following cases hold that there is no liability on the charterer if the owner retains control:

Marcadier v. Chesapeake Insurance Co., 12 U.S. 39.

Luchenbach v. McCahan Sugar Co., 248 U.S. 139.

The Nicaragua, 72 F. 207.

The Norland, 101 F. 967.

The Charlotte, 285 F. 84.

Sturgis v. Boyer et al., 65 U.S. 110.

The Leader, 166 F. 139.

The Steel Inventor, 35 F. Supp. 986.

The Volund, 181 F. 643.

Luchenbach v. Insulor Line, 186 F. 327.

In *Pacific Improvement Co. v. Schubach-Hamilton S. S. Co.*, 214 F. 854 at page 859, the court held that there is a presumption that the contract is one of affreightment only, and the contrary must clearly be made to appear before it will be held to constitute a demise. In this case the agreement provided that the owner should pay the officers and crew. The court held that while this was not absolutely controlling, yet it was persuasive.

In the case of *Barbaro v. Auditore Contracting Co. Inc. et al*, 214 N.Y.S. 221, the court held that where there is a doubt as to whether there is a demise or a contract of affreightment that same must be resolved in favor of the latter. The reason for this rule being that there must be clear and convincing proof in order to transfer burdens and liabilities which are attached to the ownership and control of a vessel.

The appellee, C. T. Smith & Son, will undoubtedly cite the case of *Frederick J. Middlebrook*, 67 Ct. of Claims 294, as supporting their contention that there was a charter pro hac vice. However, this case can readily be distinguished from the case at bar. *Frederick J. Middlebrook* was a vessel chartered to the United States Government during World War I and was, in fact, virtually a part of the United States Navy and under the direction of Naval officers, which readily excludes it from bearing directly on the case at bar. The court made special findings of fact, some of which are as follows:

1. The owners contracted with and chartered as owner thereof to the United States of America the steamship under consideration and delivered it to the United States under said charter.
2. Under express charter provisions the charterers were to pay for coal and fuel and all port charges, and the vessel was to be employed by the United States "on such duty as may be directed by naval authorities."
3. The charter contract provided "the captain shall be under orders and directions of charterers as regards employment, agency, and other arrangements."
4. The vessel was to be docked wherever the charterers directed and at their disposal.
5. The vessel was at all times subject to the orders and directions of government officers and at no time did the owners interfere with or direct the operations of the vessel. " . . . and the said steamship became an essential part of the line and service of supplies for the

war fleet. Such supplies included ammunition, oil, gas, and everything necessary for the fleet in time of war."

The vessel was destroyed through the negligence of government officers in directing that inflammable materials be carried in a part of the vessel near the boilers. Further factors are that the court found that control of navigation was exercised by the charterers and that the naval supply officer had written a letter to the owners as follows: "It is requested that the captains of any vessels now under charter to the navy department be directed to carry out orders immediately, unhesitatingly, and without question."

The court construed the charter provision that the vessel should be placed at the disposal of the government as meaning that the owners had lost all control of it.

From the foregoing it clearly appears that the government had taken complete control of the vessel and that it "was being operated under war time conditions and as a part of a combatant fleet." The owners retained absolutely no control over the vessel in any respect, and for all practical purposes the captain was bound to obey all orders of the navy department.

Appellee will probably also cite the case of *Hahlo et al v. Benedict*, 216 F. 303; however, in this case there was a written charter contract which provided, "The captain shall pay the charterer the same attention as if he were the owner. . . ." This provision formed a basis for the decision and clearly differentiates it from the case at bar.

Appellee will also undoubtedly cite the case of *The Charlotte*, 285 F. 84; however, in this case there was a written contract containing the words "did charter and lease" to the State of New York a certain vessel. The court found "that her captain was under the direction and control of the superintendent of public works even though appointed by the owners, is clearly shown, not only by the charter party but by the proofs." It appears that charters to state and federal governments vest a greater degree of control in the government than would be the case in a charter to a private individual.

Also, in *The India*, 16 F. 262, which will undoubtedly be cited by appellee, the master of the vessel by the express terms of the charter party was under the orders and directions of the charterers.

Also, in *The City of Everett*, 107 F. 964, which will undoubtedly be cited by appellee, the vessel was placed at the disposal of the charterers. The charterers provided and paid the captain and crew. The charterers paid the fuel and supplies. The charterers agreed to paint the vessel if the charter lasted over a year, and the charter provided that the captain should be under the orders and directions of the charterers.

It is the contention of the appellant:

1. In order to constitute a charter pro hac vice the charterer must be given the complete possession and control of the vessel and not merely the right to her services.

2. The Claimants must overcome the presumption against a demise and in favor of a contract of affreightment by clear and convincing evidence.

3. If the catpain and crew are appointed by and paid by the owner that factor would be of great significance in reaching the conclusion that the agreement was a contract of affreightment and not a charter *pro hac vice*.

4. The Oregon law is well settled on the proposition that a contract is to be construed as one for an affreightment only and that the factor that the captain and crew are furnished by and paid by the owners strongly suggests an affreightment.

5. The fact that the owners pay all expenses of the vessel including fuel and supplies and general maintenance also points to a contract of affreightment and nullifies the contention that it was a charter *pro hac vice*.

6. The fact that the charterers direct where the vessel shall proceed does not mean that the charter is *pro hac vice*.

7. The authority to direct the course of the captain and crew does not prevent the captain and crew from remaining the servants of the owner.

8. There can be no charter *pro hac vice* if the owner retains control of the navigation.

9. Courts are not inclined to regard a contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer.

10. Federal courts may consider a charter party in the light of the law in the state where the contract was

executed.

11. That compensation for the use of the vessel is based upon a proportionate share of the net earnings is persuasive in leading to the conclusion that the contract was one of affreightment.

The testimony in this case discloses that the compensation was to be eighty per cent (80%) of the earnings of the vessel. Such an arrangement is certainly more in keeping with the mere independent contract than with a charter *pro hac vice*. The owners through the captain were not required to take any tows, but could take them or not, as they desired. It is clear that the claimants were in the same position as four or five other tug owners, who also took tows for the appellants under the same conditions. The fact that the claimants were not obligated to take any tows at all clearly negatives any exercise of control over the vessel by appellant. On the other hand, supposing that the Willamette Tug & Barge Company did not at any time offer any tows to C. T. Smith & Son, the appellee. What would be the remedy of C. T. Smith & Son under such circumstances? Another thing to be considered is what is the length of the charter, if there was a charter? It must be remembered that the appellee in this case contends that prior to April, 1944, Willamette Tug & Barge Company chartered the "CHARLES T". It is one thing to say there was a charter. This, however, is merely a conclusion on the part of the appellee. Under all of the evidence of the facts in this case, did the appellant have the right to say that the tug "CHARLES T" was to stay in Port-

land as long as the appellant desired it to stay? Could the appellant have kept the tug in Portland without any remuneration? Did the appellant have the right to discharge the captain or the deckhand? There is nothing in the evidence to indicate that the vessel should be available at any particular time or at all. There is nothing in the evidence to show that the appellant exercised any supervision over the captain and the only evidence is that the captain of the tug was informed that a tow was available if he wanted it, and if so, where to proceed. The captain admitted that he was in full custody of the boat and that he received no orders from the appellant as to how it should be navigated. It is difficult to see how the appellee can contend that the alleged oral agreement can be construed as a charter *pro hac vice*. About the only thing that is certain in the case is that the appellee was to receive eighty per cent (80%) of all charges made for towing, and the appellant twenty per cent (20%).

In the opinion of the District Judge, James Alger Fee, stress was laid upon the fact that the owners of the tug were not licensed by the Interstate Commerce Commission to operate below Longview, while the Willamette Tug & Barge Company was so licensed. The court below stated that the Willamette Tug & Barge Company could operate below Longview with its own boats or those under demise. Section 903(f) 49 U.S.C.A. provides in part as follows:

“Notwithstanding any provision of this section or of section 902 the provisions of this chapter shall not apply—

“(1) * * * *

“(2) *to transportation by water by any person (whether as agent or under a contractual arrangement for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to chapter 8 of this title, or a water carrier subject to this chapter, in the performance within terminal areas of transfer, collection, or delivery services, or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicles, or water to which such services are incidental.*” (Italics supplied).

Thus it would appear that the tug could lawfully operate below Longview, without being under demise, so long as it was “under a contractual arrangement” with the Willamette Tug & Barge Co. for which it was engaged in towage. In the case of *De Bardelegen Coal Corporation v. U. S.*, 54 F. Supp. 643, the Court interpreted the section above quoted as meaning that a tower needs no certificate of public convenience and necessity to the extent that towage is performed for another water carrier, and that the exemption was not limited to towage within terminal areas. If the tug could lawfully operate below Longview under the terms of the statutory exemption, by merely being under contract to the Willamette Tug & Barge Company, no presumption of a demise would arise by reason of the fact that it did operate below Longview.

Even if the exemption noted above were held inapplicable, the record discloses that the Willamette Tug

& Barge Company did not know of the limitations on the operation of the tug below Longview, and that the limitations were not disclosed by the owners, nor were they in fact discussed at all by the parties when the contract was negotiated. It is fundamental that a contract of this type is to be construed in accordance with the intentions of the parties, and upon the basis of their discussions at the time of negotiations.

CONCLUSION

Appellant contends that the court erred in entering its decree against the Willamette Tug & Barge Company as set forth in the assignment of errors which are printed in the Appendix, and in not entering a decree of dismissal herein as to the appellant, and in not entering a judgment as against C. T. Smith and Esson H. Smith for its costs and disbursements.

Respectfully submitted,

SENN & RECKEN,

L. A. RECKEN,

Proctors for Appellant,

910 Public Service Building,
Portland, Oregon.

APPENDIX

ASSIGNMENT OF ERRORS

The Willamette Tug and Barge Company, appellant, hereby assigns errors in the proceedings, decisions and decree of the United States District Court for the District of Oregon as follows:

1. In holding that the libelants shall recover from the appellant, Willamette Tug and Barge Company, an Oregon corporation, the full sum of \$11,115.10 with interest thereon at 6% from and after July 28, 1944.

2. In holding that C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, shall have and recover of and from Willamette Tug and Barge Company the entire amount of the libelants' judgment which C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, may be required to pay.

3. In finding that at and before the time and place of the collision between the "Karl Liebknecht" and the barge "EK-9" being towed by the tug "Charles T", that the said C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, (105) did charter, transfer and deliver to the Willamette Tug and Barge Company the entire custody, management and control of the tug "Charles T", including the entire command and control of its navigation; and in holding that the Willamette Tug and Barge Company was the charterer of the Tug "Charles T" and that the master and deck-hand of the said tug "Charles T", to-wit: Charles Bates

and Lloyd Chappell, respectively, were at the time of the collision servants and agents of the Willamette Tug and Barge Company, a corporation; and in holding that the Willamette Tug and Barge Company is and was a charterer pro hac vice of the tug "Charles T", and that said Willamette Tug and Barge Company was and is responsible for the faults of the navigators of the tug "Charles T".

4. Appellant waives original Assignment of Error No. 4.

5. In failing to hold that under all of the facts and evidence in this case, the Willamette Tug and Barge Company, a corporation, and the said C. T. Smith and Esson H. Smith were engaged in nothing more than a contract of affreightment, and that the said C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, retained full control, supervision and management of the Tug "Charles T".

6. In failing to decree that the Willamette Tug and Barge Company, a corporation, was entitled to a decree of dismissal herein and a judgment as against the said C. T. Smith and Esson H. Smith for its costs and disbursements.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

WILLAMETTE TUG AND BARGE COMPANY,
a corporation,

Appellant,

vs.

OLE ERICKSEN and PACIFIC BUILDING MA-
TERIALS COMPANY, a corporation, C. T.
SMITH and ESSON SMITH, copartners doing
business as C. T. Smith and Son, Claimants of
the Tug "CHARLES T", Steamship "KARL
LIEBKNECHT",

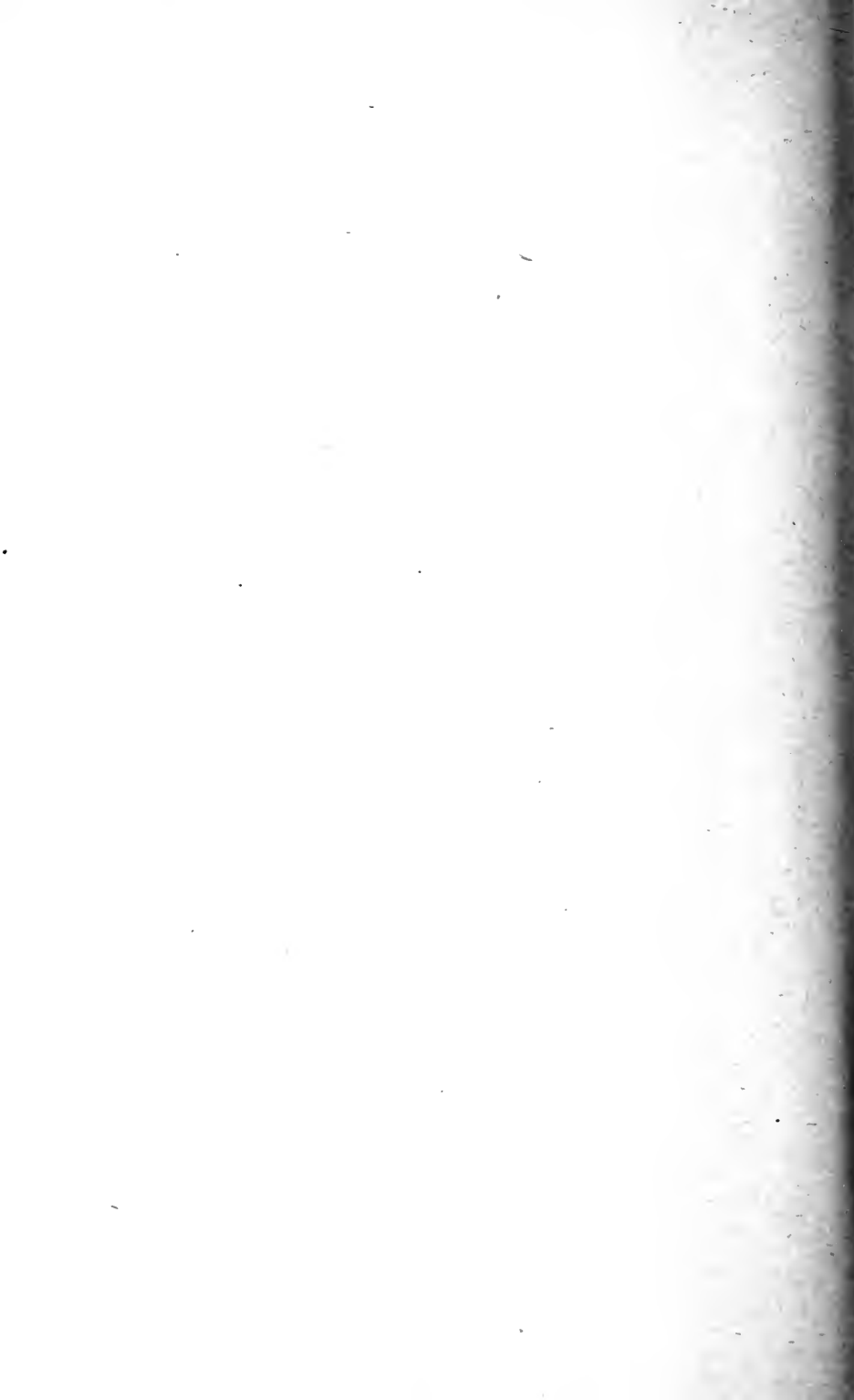
Appellees.

BRIEF ON BEHALF OF APPELLEES, C. T. SMITH AND
ESSON SMITH, COPARTNERS DOING BUSINESS AS
C. T. SMITH AND SON, CLAIMANTS OF THE
TUG "CHARLES T."

Upon Appeal from the District Court of the United
States for the District of Oregon.

THOMAS J. WHITE,
SAMUEL H. BEAR,
Proctors for Appellees
C. T. Smith and Esson Smith, etc.

907 Journal Bldg.,
Portland, Oregon.



INDEX

	Page
ARGUMENT	5
CONCLUSION	20
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	1

CASES CITED

	Page
Cornell Steamboat Co. v. U. S., 53 Fed. Supp. 349, 321 U.S. 634	17
DeBardelegen Coal Co. v. U. S. Appellant's Brief	
City of Everett, 107 Fed. 964	6, 7
Interstate Commerce Commission, Vol. 250, p. 812, Docket W-425, page 818, Docket W-643	17
James v. Brophy, 71 Fed. 310	9
Knickerbocker Ice Co. v. Stewart, 253 U.S. 129, 40 S.C. 438	19
Frederick J. Middlebrook, 67 Ct. of Claims 294, cert. denied 280 U.S. 564	6
Quirk v. Clinton, Fed. case No. 11518	9
Swayne & Hoyt v. Barsch (CCA 9), 226 F. 581	19
The Bombay, 38 Fed. 512	8
The Charlotte, 285 Fed. 84, 299 Fed. 595	6, 7, 8
The India, 16 Fed. 262, 263	7
The R. Lenahan, Jr., 43 Fed. (2d) 858, 862	9, 10
The Nate E. Sutton, 42 F. (2d) 229, 231	9
The Thielbek (CCA 9), 241 F. 209	19
U. S. Lubinski (CCA 9), 153 F. (2d) 1013, 1014	20
U. S. v. Shea, 152 U.S. 78 (14 S.C. 519)	7, 8, 10
Watts v. Camors, 10 Fed. 145	19
Webb v. Peirce, Fed. Case No. 18320	9

STATUTES CITED

Title 49, Section 14 (3), U.S.C.A.	17
Title 49, Section 917 (a), U.S.C.A.	17



In the United States
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WILLAMETTE TUG AND BARGE COMPANY,
a corporation,

Appellant,

vs.

OLE ERICKSEN and PACIFIC BUILDING MA-
TERIALS COMPANY, a corporation, C. T.
SMITH and ESSON SMITH, copartners doing
business as C. T. Smith and Son, Claimants of
the Tug "CHARLES T", Steamship "KARL
LIEBKNECHT",

Appellees.

BRIEF ON BEHALF OF APPELLEES, C. T. SMITH AND
ESSON SMITH, COPARTNERS DOING BUSINESS AS
C. T. SMITH AND SON, CLAIMANTS OF THE
TUG "CHARLES T."

Upon Appeal from the District Court of the United
States for the District of Oregon.

SUMMARY OF ARGUMENT

The Appellees, C. T. Smith and Son, contend that the Appellants had the full command and possession of the tug "CHARLES T", and the control over its navigation at the time of the collision that resulted in the damage to the barge "EK-9" complained of by Libelants in their libel; and that having the said command and

possession of the said tug and the control over its navigation at the time and place of the collision, the Appellants were, in fact and in contemplation of law, the charterers pro hac vice of the tug, and as such, are liable over to the Appellees, C. T. Smith and Esson Smith, the general owners and claimants of the tug, for the damages assessed against the tug "CHARLES T", her owners and bondsmen.

STATEMENT OF FACTS

This cause is civil and maritime and is now before this Honorable Court on appeal from the decree entered in this cause against the Appellants, Willamette Tug and Barge Company, an Oregon corporation, by the United States District Court for the District of Oregon, in which court the cause was heard by the Honorable James Alger Fee, District Judge.

As is admitted by the Appellants on page five of their Brief now on file with the Court in this cause, the issues in this appeal stem from one proposition, to-wit:

DID THE ORAL ARRANGEMENT BETWEEN C. T. SMITH AND SON AND THE APPELLANTS CONCERNING THE TUG "CHARLES T" CONSTITUTE A CHARTER PRO HAC VICE, OR WAS IT MERELY A CONTRACT OF TOWING OR AFFREIGHTMENT?

The issue being thus narrowed and the Statement contained in Appellants' Brief at pages two to five thereof having otherwise covered the history of this

case, this statement on behalf of C. T. Smith and Son will be limited to a brief summary of the record and of the issues as we view them and as they relate to the existence of a charter pro hac vice at the time and place of the collision alleged in the Libel and which collision resulted in damage to the barge "EK-9".

C. T. Smith and Esson Smith are copartners doing business under the firm name of C. T. Smith and Son and maintain offices at Stevenson, Washington, and The Dalles, Oregon. The firm operates under certification of the Interstate Commerce Commission, having authority for general towage by towing vessels between all points along the Columbia River and its tributaries from Longview, Washington to Alderdale, Washington, inclusive, but not including the Willamette River above Oregon City, Oregon (R. 84-85, R. 96).

The Appellants operate under certification of the Interstate Commerce Commission and have authority to move commodities generally by non-self-propelled vessels and general towage by towing vessels from points on the Columbia River and its tributaries below Vancouver, Washington, and on the Willamette River below Portland, Oregon, including the ports named (R. 96; R. 103).

The uncontradicted evidence is that Eesson Smith and Arthur A. Riedel, general manager for Appellants, acting on behalf of their respective firms, conducted a telephone conversation as to the use of the tug "CHARLES T" by the Appellants (R. 86; R. 97), and that about a month after the telephone conversation,

the said parties had a meeting in Mr. Riedel's office (R. 86). As the result of the conversations, the tug was moved to Portland, where it was kept, when not in use, at the dock of the Appellants (R. 87). By the terms of the agreement between Mr. Smith and Mr. Riedel, C. T. Smith and Son paid the expenses of the tug and the salaries of the master and crew, as well as the cost of the crew's maintenance (R. 86). The Appellants billed in their own name, without any reference to C. T. Smith and Son (R. 96) and made all collections for the services of the tug (R. 86; R. 97). Smith and Son received 80% of the revenue earned by the tug as determined by the amount of work performed by it and billed by the Appellants under their established tariff (R. 86; R. 97; R. 104). The tug was employed for the most part in moving barges loaded with lend-lease equipment for Russia (R. 103). This type of work Appellants could do under their I.C.C. authority. The Tug also at times was used by the Appellants for moving their own property (R. 77).

There were times when the Appellants placed their own captain aboard (R. 81), and there were times when they directed which channels of the river were to be used by the tug (R. 77). The tug had always before pushed barges, but on this particular tow during which the accident occurred, the captain of the tug was directed by the Appellants to use a towing bridle and to tow the barges (R. 78; R. 82). The undisputed evidence (R. 77) is that during the period covered by the charter, the master of the tug never received any orders from C. T. Smith and Son concerning the use or the navigation of

the tug; such orders came from the Appellants (R. 76).

Admittedly, there is some conflicting evidence in the record, but on behalf of C. T. Smith and Son, it is respectfully urged that the weight of the evidence considered by the trial court fully established the existence of an oral charter *pro hac vice* as alleged by said Appellees in their petition to bring in the Appellants under Rule 56, Admiralty Rules of Practice. The respective positions of the Appellants and of C. T. Smith and Son are further set forth in paragraph 27 of the pre-trial order (R. 46, 47).

ARGUMENT

The Appellees, C. T. Smith and Son, hereinafter called for convenience and brevity "Appellees", do not question the rule of law cited by Appellants that a charter *pro hac vice* contemplates a transfer of the entire command, possession and consequent control over its navigation of a vessel, and amounts to a demise of a vessel. Nor, in the main, is there any argument with counsel as to the general rules of law so generously copied from the text of American Jurisprudence, so far as those rules of law are limited to the facts involved in the cases cited in support of that text. The position of the Appellee and the findings and conclusions of the trial court (R. 53) are that there was in fact and in law a charter whereby the Appellees did charter, transfer and deliver to the Appellants the entire custody, management and control of the tug "CHARLES T", including the control over its navigation, and that by reason of the existence of that charter at the time of the collision between the

barge "EK-9" and the Russian steamship "KARL LIEBKNECHT", the Appellants became responsible for the faults in the navigators of the said tug (R. 55) and for the damage done to the "EK-9" in the collision (R. 55, 56). The authorities cited by counsel in their able Brief support the rule that transfer of the entire command, and possession of a vessel and consequent control over its navigation amounts to a demise of the vessel, and that the charterer will generally be considered as owner for the voyage or service contemplated; and as we understand Counsels' Brief, Counsel admit this rule. Authorities in point are:

Frederick J. Middlebrook, 67 Ct. of Claims 294,
Cert. denied 280 U.S. 564.

The Charlotte, 285 Fed. 84, 299 Fed. 595.

The City of Everett, 107 Fed. 964.

The evidence establishes without question that Appellees were to pay all operating expenses of the tug, the wages of the master and crew and the cost of the crew's groceries, and great reliance is placed on this evidence by Appellants in their attempt to show the existence of a contract of towage rather than of a charter pro hac vice. The record shows that the trial court was not unmindful of Appellant's position. In the Court's opinion (R. 50) it is stated:

"There are some circumstances which strengthen this view such as the fact that master and crew were employees of claimants."

However, the fact that the general owner furnishes and pays the master and the crew and furnishes the supplies of the vessel, does not prevent the existence of a

charter pro hac vice.

In *The Charlotte*, 285 Fed. 84, at page 87, the Court said:

"The fact that the owners were to keep the tug in good condition and repair her when necessary, clean the boilers once in three weeks, and furnish the master and crew and pay them, does not negative the plain import of the charter that from May 15, 1919 to some time between November 15 and December 15, when navigation closed, the tug would be in the possession, management and control of the charterer."

In *The India*, 16 Fed. 262, at page 263, the Court said:

"That a charterer to whom is given the entire possession, management, and control of the ship, becomes the owner pro hac vice—although, by the terms of the charter party, the general owner appoints the master and selects the mariners, as was the case by the charter party here,—is not doubted, * * * ."

In *United States v. Shea*, 152 U.S. 178 (14 S.C. 519) the Court, in speaking of the legal affect of the charter provision whereby the general owner was to supply the captain and certain other crew members, said on page 190:

"We think little significance is to be attached to the provision in reference to furnishing a crew or supplying fuel. These were matters of detail affecting the price to be paid, but throwing no light on the question of hiring or control."

Appellants cite on page 31 of their Brief *The City of Everett*, 107 Fed. 964. Appellees claim for this case that it is authority for the rule above set forth, and especially so when, as in the case at bar, it is contended, as the

Appellees do contend, that the captain was under the orders and direction of the charterers.

Another case in point is *The Bombay*, 38 Fed. 512.

On page 12 of Appellant's Brief the point is made that the evidence in the record is silent as to the duty to make repairs. But the mere fact that the general owner keeps the vessel in repairs does not negative the existence of a charter pro hac vice. *The Charlotte*, 285 Fed. 84, at page 87.

On page six of the Brief the statement is made that there is no testimony in the record as to how long the arrangement between Appellants and Appellees were to last. On behalf of Appellees it is submitted that it is not important to the existence of a charter pro hac vice that there be a definite time stated in the charter.

In *United States v. Shea*, supra, when considering the effect of a charter provision that the owner was to furnish the vessel " * * * whenever called upon during the fiscal year ending June Thirtieth, eighteen hundred and eighty-seven, * * *" the Court said on page 190:

"That the time for which the vessels were to be employed might be limited by the wishes of the government does not affect the question as to whether, while so employed, they were to be under its exclusive control and management. A demise may be for a day as well as for a year, and may be terminable at the will of the lessor."

The record, however, does contain the undisputed testimony that the tug was to be under charter to the Appellants for "approximately two months" (R. 87).

Appellants lay great stress on the fact that Appellees were to be paid for the use of the boat a percentage, 80%, of the earning of the vessel while the same was being used by the Appellants. Yet it has been held that the facts that the general owner is paid out of the revenue of the vessel is not important or controlling on the issue of whether a charter or a contract of towage exists.

In *The Nate E. Sutton*, 42 F. (2d) 229, at page 231, the Court said:

"The compensation of the operator was fixed at 5 per cent. of the net profits. But the substitution of this for fixed compensation to the owner did not affect the dominion or control over navigation, so long as the agreement remained in effect."

The same rule was applied in *Webb v. Peirce*, Federal Case No. 17320, where it appears that the vessel was let "on shares" under an oral agreement, for an indefinite period of time.

Appellants contend that some weight is to be given to the support of their position by the fact that the agreement between the Appellants and the Appellee was oral. On behalf of Appellees, it is contended that a charter for a vessel can be oral. Authorities in point are the following:

The R. Lenahan, Jr., 43 Fed. (2d) 858.

James V. Brophy, 71 Fed. 310.

Quirk v. Clinton, Federal Case No. 11518.

In the last cited case the court said:

"But it is not necessary under the law merchant to have a specific engagement in writing to constitute the legal letting of a ship; a hiring without a writing is valid."

Neither are "technical words necessary to create a demise". *United States v. Shea*, supra, at page 189. The essential thing is to construe the agreement correctly in connection with the actions of the Appellants and the Appellee. *The R. Lenahan, Jr.*, 43 Fed. (2d) 858, page 862.

That the Appellants and the Appellees intended the agreement as a demise and not as a contract of towage is evidenced by what they did, in fact, do.

The testimony of Esson Smith, called on behalf of Appellees, establishes that his firm (a copartnership consisting of himself and his father (R. 84), is engaged in the log towing business (R. 84). The firm has I.C.C. general towing rights, but has no authority to tow below Longview, Washington, but Mr. Smith testified that he, himself, had been below Longview "a couple of dozen times" and knew the thread of the channel (R. 85). Mr. Smith represented his firm in making the arrangements with the Appellants (R. 85). As to this arrangement, Mr. Smith testified (R. 86, 87) as follows:

"A. About thirty days before the boat went down there I had a conversation with Mr. Riedel over the phone in regard to the charter of the boat and he said that we would get together at a later date, and on April 4, 1945, I went to Mr. Riedel's office—rather, he called me two days before that, that he wanted the boat the next day, and I went down to his office and talked to him about it and we agreed that he would charter the boat and I would pay all operating expenses connected with it, Diesel oil and lube oil and groceries, wages, and that I was to take 80 percent. of the gross revenue earned by the boat; Willamette Tug and Barge

were to do all the collections, make all the collections, make all the billings, and pay on the 10th of the following month.

Q. Now, was that your contract or agreement with Willamette Tug and Barge concerning the use of this vessel?

A. It was.

Q. Now, did you know what the Willamette Tug and Barge Company was going to do with this tug?

A. No. I had a general idea as to what they were going to do. I wouldn't say that I did know each move that they were going to make. I knew that they were going to handle barges with it.

Q. You knew the general nature of the business of the Willamette Tug and Barge Company?

A. Yes.

Q. Now, how long was the tug under charter to the Willamette Tug and Barge Company?

A. Approximately two months."

Mr. Smith also testified (R. 87) as follows:

"The Court: Where was it kept?

Mr. White: Q. Where was the tug kept?

A. Well, in Mr. Riedel's and our conversation, that tug was to be kept at his dock, at their moorage, because he said that his boats were kept at Tracey's moorage and he would be on a par with Portland Tug & Barge and other operators in that zone on the charges. In other words, if his boats ran from one zone to another it would cost the customer more, so he specifically stated that he wanted that boat kept at his moorage.

Q. Was that part of the agreement?

A. Yes.

Q. Now, during the period that the Willamette Tug and Barge Company had this tug, the Charles T., did you ever inspect the boat or look at the boat?

A. I never was aboard it until the day it left Portland.

Q. What instructions did you give Captain Bates concerning the use of this tug by the Willamette Tug and Barge Company?

Mr. Recken: We will enter our same objection, your Honor.

The Court: I will take the testimony, subject to the objection.

Mr. Recken: Yes.

Mr. White: Answer the question, please.

A. I told Mr. Bates to take the boat to the Willamette Tug and Barge's moorage and that he would receive his instructions there.

Q. Now, did you ever give Mr. Bates any instructions concerning the operation or navigation of this tug?

A. No.

Q. Excuse me—during the time that the Willamette Tug and Barge had the tug?

A. No."

In Appellant's Brief (pages 12, 13) the point is made that the Appellee cashed without protest a check made out in payment "for towing". Mr. Smith, in his testimony, gives the following explanation of that matter (R. 89):

"Mr. Recken: And the counter, the copy. I believe they are both together.

Q. I wish you would examine that check and also the copy.

A. Yes.

Q. And it is noted on there that it is for towage, isn't it, for the month of April?

Mr. White: If the Court please, I will object to that question on the same ground that Mr. Recken previously objected to my question. These are checks of the Willamette Tug and Barge Company. It has their writing thereon. They are nothing more than self-serving declarations.

The Court: Received, subject to the objection.

Mr. Recken: Q. Is that correct?

A. This is a check written out by Willamette Tug and Barge Company to C. T. Smith and Son in the amount of dollars, and the invoice says "for towing". However, that is their writing, and at that time there was no trouble between Willamette Tug and Barge and Smith and Son, and I accepted the money.

Q. Well, you cashed the check?

A. That is right.

Q. Before the 10th of May, knowing that it was for towage, and you made no objection whatsoever to that, did you?

A. I cashed the check.

Q. You never complained to Mr. Riedel or any Willamette Tug and Barge official that that was incorrect or wrong?

A. Well, I don't see that the wording of a bill written by - * * * ."

Mr. Smith further testified (R.90) in answer to questions by Mr. Recken:

"Q. I hand you Pre-Trial Exhibit No. 14 and ask what that is?

A. It is a bill rendered by C. T. Smith and Son to Willamette Tug and Barge Company for \$2654.67 which they have not paid.

Q. And that bill was made up by C. T. Smith and Son on the log which was furnished to you by your captain?

A. This bill was made up by going—I had a copy of the log made by my captain and I went to the dispatcher at the Willamette Tug and Barge Company's office and went over the moves with him to see that we had the right amount of moves and that I got the right amount of dollars out of the job. Willamette Tug and Barge never at any time gave me a copy of any of their billings or anything else. I had no way to find out how much money they owed me other than the log."

The above testimony established that Appellees retained no control over the movements of the tug; and while there is, as is pointed out by Appellants, some testimony in the record contradicting, in part, this testimony, the fact remains that this is a cause in admiralty and that the trial judge saw and heard the witnesses. Furthermore, there is other evidence in the record in support of the findings of the trial court.

On this point, Captain Charles Richard Bates testified as follows (R. 76, 77, 78):

“A. Well, when I got there I was to take further orders from the Willamette Tug and Barge; they had the rest—we was just to go to there and they give the rest of the orders, that was all.

Q. What date was that?

A. Well, I don't know exactly what date it was.

Q. Prior to the collision approximately how long was it?

A. Oh, a month, anyway.

Q. A month, anyhow?

A. Yes.

“Q. Now, during that period from the time that you took the boat to the Willamette Tug and Barge Company to the time of the collision who did you take your instructions from?

A. The company, you mean? I took it from the dispatcher of the Willamette Tug and Barge and once in a while from Mr. Riedel.

Q. How were these orders given to you?

A. Well, some of it was given orally and some of them they wrote it out on a little piece of paper, where I was to go.

Q. Did they tell you how to do your work, in addition to where to go?

A. Why, yes, in a way they did, told us where to go and how to—once in a while they would tell us which way to go, like down through the slough

if they was having a trial run on the river there with ships.

Q. They would tell you what channels to use, is that right?

A. Yes.

Q. Did you ever do any miscellaneous work, such as furnishing supplies for Willamette Tug and Barge Company's other boats?

A. Doing what?

Q. Did you ever get, say, any oil drums for other boats of the Willamette Tug and Barge?

A. Yes, we have run over to the oil docks and brought over a barrel of oil for the barge, and stuff like that, just run around and—

Q. Now, during this period the boat was—pardon me, I will reframe my question. Where was the boat kept during this period when not in use?

A. At their moorage, tied up at their moorage.

Q. At whose moorage?

A. The Willamette Tug and Barge.

Q. Was the boat during that period ever at the moorage of C. T. Smith and Son?

A. No, it was not.

Q. Where is their moorage?

A. C. T. Smith and Son, you mean?

Q. Yes.

A. It is at Stevenson, Washington.

Q. Did you during that period ever receive any orders concerning the navigation of the boat or any other orders pertaining to the Tug "Charles T" from Esson Smith or C. T. Smith?

A. No, I never.

Q. Now, on the day of the collision, when you were preparing the boat to tow the three barges, one of which was involved in the collision, did the officials of the Willamette Tug and Barge Company give you any special orders relative to the making up of the tow?

A. Well, they told us to take them down on a towline, and asked us if we had a bridle, and we never had no bridle, so they says get the one they had on the Henry J. That is one of their own tugs.

Q. They furnished you the towing bridle?

A. Yes.

Q. How do you usually move barges?

A. Push them on the bow of the boat, on one side.

Q. And who gave you these orders to use a towing bridle?

A. Howard Brands, I believe the name was, Mr. Howard Brands.

Q. And who was he?

A. He was a dispatcher for the Willamette Tug and Barge."

This testimony of Captain Bates relative to the manner of towing the three barges on the trip during which the collision occurred is uncontradicted and is further supported by that of Lloyd Chappell (R. 82).

It is to be noted also that after the collision that damaged the "EK-9", Captain Bates reported to and received his instructions from the Appellants (R. 79).

On redirect examination, Captain Bates testified as follows (R. 81):

"Q. Captain, did the Willamette Tug and Barge Company ever furnish one of their pilots to go on the boat?

A. Yes, when they told us to go down the slough, why, I had never been down the slough before, and they furnished a captain to go down."

The undisputed evidence is that the Appellants made the contracts for the services performed by the tug and billed their customers in their name and under the tariffs published by the Columbia River Tariff Bureau, of which Bureau the Appellants were a participating carrier (R. 102, 103, 104).

. As part of Appellees' case, there was read into the record (R. 96) a reference to two reports of the Interstate Commerce Commission: Volume 250 at page 812 under Docket No. W-425 and at page 818 of the same volume under Docket No. W-643. As to the competency of these reports as evidence in the courts of the United States without further proof or authentication, reference is here made to Title 49, Section 14 (3) U.S.C.A. Reference is also made to Section 917 (a) Title 49, U.S.C.A. making a violation of an order, or of any term or conditions of any certificate or permit issued by the I.C.C., unlawful.

Appellees have no authority from the I.C.C. for performing towing services below Longview, Washington. Neither have Appellees authority from the I.C.C. to transport commodities on non-self-propelled vessels. The undisputed evidence is that the tug was employed towing from Portland to Beaver, a place 12 miles below Longview. (R.78) and that in so doing the tug was "back and forth several times from the Washington side to the Oregon side". (R.79). That these operations performed by the tug were in interstate commerce and subject to control by the I.C.C. seems clear from the holdings in *Cornell Steamboat Co. v. United States*, 53 Fed. Supp. 349, 321 U.S. 634. Certainly, as Appellants point out in their brief, they have the right to obtain a boat from another carrier, and to make use of that boat over territory and in the transportation of commodities which the owner of that boat may not be certificated to do. This was the very point that Appellees make, since the use of the tug was in a trade which the owner could

not legally engage in and must have therefore been conducted under the authority of Appellants, a trade which they could and did engage in under authority granted by the Interstate Commerce Commission. The evidence is uncontroverted that the billing and all other relationships with the shipper were controlled by the Appellants, and these facts, together with trade in which the boat was engaged, is indicative of the control these appellants must necessarily have had under these circumstances to fulfill their obligations and responsibilities to the shippers. For Appellants to say they had no control would be most inconsistent with this evidence.

In the case at bar, the Court stated in its opinion (R. 50) that the Appellants' own boats, or those under demise, could, under Appellants' license, go below Longview. This same thought is also found expressed in paragraph VII of the Findings of Fact (R. 53, 54). The argument on these facts is that both the Appellants and the Appellees are entitled to the presumption that they intended to do a lawful act, and that if of two methods of accomplishing an object, one was lawful and the other unlawful, it would be presumed that the lawful method was intended.

Be that so it may, the fact remains that on the voyage that resulted in the damage to the "EK-9", the Appellants did furnish the towing bridle and did instruct the master of the tug as to the method of moving the tow. The Appellants did exercise control over the master and, of course, the tug.

Appellants in their Brief cite at great length certain

cases decided in the Supreme Court of Oregon. With all due respect to that court, and regardless of what those cases may be said to hold, the fact remains that those cases are not controlling in a court of admiralty; for the law in this Circuit is clear that federal courts sitting in admiralty are not bound by state statutes or by state decisions. Counsel misconstrues the case of *Watts v. Camors*, 10 Fed. 145, for that case is direct authority, as we read it, for the rule that in the admiralty and maritime jurisdiction, the federal courts follow the general principles of the maritime law as they are recognized in the commercial world, rather than the narrow, local law that may happen to prevail where a charter party happens to be made. Other cases in point are:

The Thielbek (CCA 9), 241 F. 209.

Swayne & Hoyt v. Barsch (CCA 9), 226 F. 581.

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149,
40 S.C. 438.

From these authorities, it seems clear that where the admiralty and maritime law applicable to the instant case conflict with the Oregon cases, the Oregon cases cease to be authorities.

And after all, the Oregon cases cited, as indeed do the other cases cited by counsel, agree that where the charterer has the control, management and navigation of the vessel, he is held to be the charterer pro hac vice.

The contention of Appellee is that the control, management, and navigation of the tug were transferred to the Appellants and that the master of the tug was at the time of the collision a mere sailing master.

CONCLUSION

On behalf of Appellee, it is respectfully submitted that the trial court, having seen and heard the witnesses, and having seen and examined the exhibits introduced in the record, and, with that evidence before it, having considered the facts and the law applicable thereto, its decree should be affirmed. *U. S. v. Lubinski* (CCA 9) 153 F. (2) 1013, at page 1014.

Respectfully submitted

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